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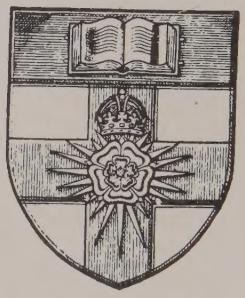

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THE

CRIMINAL APPEAL REPORTS.

WITH

SUBJECT INDEX, TABLES OF CASES AND STATUTES CITED,

AND THE

CRIMINAL APPEAL ACT, 1907,

AND

AMENDING AND EXTENDING ACTS.

EDITED BY

HERMAN COHEN,

OF THE INNER TEMPLE, BARRISTER-AT-LAW.

VOL. I.

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1909.

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CORRIGENDA.

Page 16.—*For* "25th May" *read* "22nd May."

,, 42.—Note (*a*).

,, 80.—*For* "notice" *read* "evidence."

,, 169.—*For* "22" *read* "72."

,, 169.—*For* "233" *read* "253."

,, 175.—*For* "626" *read* "416."

,, 179.—*For* "sect. 3, sub-sect. 4" *read* "sect. 4, sub-sect. 1."

BIBL. LONDIN. UNIV.

INDEX OF APPELLANTS' NAMES.

	PAGE
Allen, Charles	18
Allen, Thomas	197
Anthony, William R.	82
Arnold, Albert	27
Ashford, Edwin	185
Atkins, Joseph	45, 69
Baker, Charles	9
Barrett, William	64
Bates, Rachel	47
Bayley, Harry	86
Beauchamp, Stanley	53
Bernard, Marcus Edward Septimus	218
Betridge, James	236
Boyd, George Frederick	64
Bradley, John	146
Brann, Arthur John David	256
Briggs, Robert	192, 206
Brown, George (*alias* Fred Brockwell)	82
Brown, Walter John	85
Butcher, Leopold Ernest	54
Burke, Daniel	245
Carpenter, George	210
Chadderton, Samuel	229
Coleman, George	27, 50
Concannen, Patrick	229
Cooper, Edward	88
Crawley, G.	4
Dalloz, Max	258
Dewberry, Frederick Charles	80
Dibble, John Edward (*alias* John Corcoran)	155
Dodds, Matthew James	65
Dowling, Joseph Francis	10
Dunleavy, Edward	212, 240
Dunton, George	165, 191
Dyson, A. E.	13
East, Mary	183, 205
Elliott, Henry	15
Ellwood, John William	181
Evans, W.	203
Fairbrother, John James	233
Farrington, Daniel	113
Fleming, Joseph Albert	161
Fleming, Patrick John	146
Fluellin, Charles	30
Francis, Elijah	259
Gathercole, Robert	43
George, Abraham	168
Gerhold, Alfred	104
Gerhold, William	104
Gray, James Adam	154, 225
Green, Isaac	124
Greenaway, William	18, 31

	PAGE
Goulding, James	121
Gowlett, E. (*alias* E. Woodford)	204, 238
Guenther, Charles Frank	19
Gulston, Robert	165
Gylee, Harold Burnett	242
Hamilton, Charles	87
Hampshire, Edwin Anthony	212
Harding, Ethel	219
Hartleigh, Harold	17
Hawes, Charles	26, 42
Heaps, Arthur	106
Hemming, William	34
Hewson, Edward	47, 70
Hibberd, F.	6
Hill, George	158
Hillary, John Rayment	153
Hillman, William	49
Hipperson, Horace William	94 111
Hitchin, George Frederick	161
Hooper, George	109
Horsfall, Charles	37
Howells, Joseph Henry	197
Hunting, Holly	177
Jacobs, Philip	215
Jefferson, James	95
Jones, Harry	27
Jones, John (*alias* A. Spanier)	196
Jones, Joseph	37
Joyce, George	82
Joyce, Henry	131, 142
Kersey, Maud	260
Key, Harry	135
Kirkpatrick, Alexander	170
Knight, Thomas	186
Lanceley, James	146
Lane, George	158
Laws, M.	6
Lee, J.	5
Lord, Daisy	110
Lovett, Alfred Isaac	94, 111
Lucas, George	234
Lucas, Walter	61
Macdonald, James (otherwise Murphy)	262
Mack, John	132
Martin, Max Albert	209
Martin, Henry	33, 52
Mason, R. C.	73
Maurice, Jane Elizabeth	176
McGuire, Thomas	38
Meyer, Peter	4, 10
M'Garry, Percy Lett	193
Mortimer, Bertram	20
Morton, Percy Alfred	255
Mudge, William	62
Muirhead, James	189
Munns, W. H.	4
Nicholls, James	167
Noble, Benjamin R.	30
Norman, W. H.	93
Nuttall, James	180
Oliver, John	45
Orris, James	199
Osborne, James	134
Osborne, Leonard	133, 144
O'Sullivan, Patrick	35
Paynter, Frederic	253
Pays, Henry	48
Pearson, Benjamin	77
Peters, Thomas	131, 141
Phillips, William	120
Pitchforth, Thomas Clarence	249
Prince, Fanny	252

	PAGE
Randles, Joseph	194
Rees, Sarah	83
Riley, William	93
Roumillen, Frank	25
Rutter, William	174
Shea, John	88
Sidlow, Squire	28
Simpson, Harry	87
Simpson, Henry	53
Smith, James	146, 255
Smith, John	203
Snell, Ernest	17
Sockett, Mary	101
Soper, John J. A.	63, 73
Sovosky, Barnett	84, 98
Spencer, John Frederick	37
Stewart, J. H. McTaggart	57
Stocks, Haslam	88
Syres, Thomas Alexander	172
Tate, Gerald	30, 39
Thomas, Warren	109
Towler, Arthur	34
Van Waas, Helena	28
Vaughan, William Stanley	25
Ward, Edgar Allan	177
Warner, William	227
Watkins, John	183
Weaver, Henry	12
Westacott, Walter	216, 246
Williams, Robert	10, 20
Williamson, T. H.	3
Winkworth, Samuel	129

TABLE OF CASES CITED.

[*The letters* "R. v." *in criminal cases are omitted.*]

PAGE

Baines, Mary (1900) 200
Baines (1886) 223
Belton *v.* Busby 149, 150
Boyes 40
Bradley, Fleming and Lanceley. 161
Bristol (Earl of) *v.* Wilsmore .. 188
Bromage *v.* Prosser 175
Brown (1901) 134
Brown *v.* Patch 149, 150

Castro 16
Christopher 23
Clemens 175
Cook (1884) 147, 151
Coppen *v.* Moore 56
Corrie and Watson 149, 151
Cox, Hannah (1901) 223
Cramp 40

Deaville, Albert ...148, 150, 151, 162
Downes *v.* Johnson 148, 149
Dring 200
Dyson 189

Farrell 59
Francis..... 241

Gavin 78
Gray (1891)..... 223

PAGE

Greenwood *v.* Backhouse 138
Gridley *v.* Samborne 56, 57

Hadwen 178
Harris (1860) 169
Heywood 16
Holbrook 137
Hughes..... 89

Jones, William (1898).....189, 190

King..... 88

Lee, John (1908)...142, 169, 170, 228
Lee *v.* Risdon 90
Little 156

Makin *v.* A.-G. for New South Wales 15, 248
Matthews..... 23
Martin (1832)..... 15
May, Jane (1867) 261
Meunier, *In re* 40
Meyer 23, 36
Miller (1853) 201
Morris (1867) 14
Murray (1906)..... 179

	PAGE
Pearson	198
Penfold	134, 207
Powell *v.* Kempton Park Racecourse Co.	148, 150
Preston	23
Rowton	117
Scudder, James	102
Smith, T.	80
Starey *v.* Chilworth Gunpowder Co.	56
Stride, &c.	11
Stubbs	40
Tatlock	74
Thistlewood	49
Thompson (1876)	59
Thurborn	23
Tolson	86
Townley	89
Twose	175
Tyrrell	102
Wakelin *v.* L. & S. W. Railway	259
Whitechurch	102
Wiley	78
Wilkinson and Marsden	188
Willow (1904)	193
Wood	23
Woodward (1862)	201

REFERENCES TO CRIMINAL APPEAL ACT AND RULES.

PAGE

Sect. 3 (c) 110
4 (1) 12, 14, 19, 23, 50, 88, 91, 113, 168, 179, 185, 246, 256
(3) 87
5 (2) 14, 26, 31, 88, 91
(4).....45, 95, 101
6 (2) 16
9 (a). *See* Rule 32*b*.
(b) 7, 20
(c) 20
10 ..... *passim*
11 (1) 212

PAGE

Sect. 14 (1) 244
(3) 28
15 (2) 45
16 (1) 174
17 5
19 234
20 (2) 85

RULES UNDER THE ACT.

Rule 9..... 16
32*b* 33

TABLE OF STATUTES.

	PAGE
5 Geo. 4, c. 83,	
s. 4	176
s. 5	85, 176
s. 14	85
7 Geo. 4, c. 64, s. 15	179
8 & 9 Vict. c. 109, s. 4	161
14 & 15 Vict. c. 100,	
s. 1	179
s. 9	18, 31
16 & 17 Vict. c. 119,	
s. 2	162
s. 3	146, 161
24 & 25 Vict. c. 96,	
s. 31	88
s. 75	74
s. 80	73
s. 91	88
s. 92	77
s. 100	16
c. 97, s. 20	174
c. 100,	
s. 20	141
s. 58	101
s. 60	260
27 & 28 Vict. c. 47	107
s. 9	87
28 & 29 Vict. c. 18, s. 3	155
32 & 33 Vict. c. 62,	
s. 12	249
s. 13 (1)	189
34 & 35 Vict. c. 112, ss. 7, 9, 20.	134
35 & 36 Vict. c. 94, s. 12	208
42 & 43 Vict. c. 69, s. 17	162
46 & 47 Vict. c. 38	97
47 & 48 Vict. c. 64, ss. 2 (2), 5 (2)	223
c. 76, s. 4 (1a)	135, 137
48 & 49 Vict. c. 69, s. 5	229
50 & 51 Vict. c. 28, ss. 2 (2), 3 (1) (b), (d), 18	54, 56, 57
51 & 52 Vict. c. 41, ss. 3 (vi), 64 (1)	179
53 & 54 Vict. c. 5, ss. 169—176	179
54 & 55 Vict. c. 69	107
s. 1 (1)	141
57 & 58 Vict. c. 41, s. 1	252
61 & 62 Vict. c. 36,	
s. 1 (a)	22
s. 1 (f)	18
c. 60, ss. 1 (2), 2 (1)	192, 206
1 Edw. 7, c. 10, s. 1	12
2 Edw. 7, c. 28, s. 6	193
4 Edw. 7, c. 15, s. 1 (3)	13
Statute Law Revision Act, 1892.	142

CRIMINAL APPEAL ACT, 1907.

(7 Edw. 7, c. 23.)

ARRANGEMENT OF SECTIONS.

Court of Criminal Appeal.

SECT.

1. Constitution of Court of Criminal Appeal.
2. Registrar of the Court of Criminal Appeal.

Right of Appeal and Determination of Appeals.

3. Right of appeal in criminal cases.
4. Determination of appeals in ordinary cases.
5. Powers of Court in special cases.
6. Re-vesting and restitution of property on conviction.

Procedure.

7. Time for appealing.
8. Judge's notes and report to be furnished on appeal.
9. Supplemental powers of Court.
10. Legal assistance to appellant.
11. Right of appellant to be present.
12. Duty of Director of Public Prosecutions.
13. Costs of appeal.
14. Admission of appellant to bail, and custody when attending Court.
15. Duties of registrar with respect to notices of appeal, &c.
16. Shorthand notes of trial.
17. Powers which may be exercised by a judge of the Court.
18. Rules of Court.

Supplemental.

19. Prerogative of mercy.
20. Criminal informations, procedure in the High Court, &c.
21. Definitions.
22. Repeal.
23. Short title, extent, and application.

Schedule.

CRIMINAL APPEAL ACT, 1907
(7 EDW. 7, c. 23).

An Act to establish a Court of Criminal Appeal and to amend the Law relating to Appeals in Criminal Cases.

[28th August, 1907.]

BE it enacted by the King's most Excellent Majesty, by and with the advice and consent of the Lords Spiritual and Temporal, and Commons, in this present Parliament assembled, and by the authority of the same, as follows :—

COURT OF CRIMINAL APPEAL.

Constitution of Court of Criminal Appeal.

1.—(1) There shall be a Court of Criminal Appeal, and the Lord Chief Justice of England and eight judges of the King's Bench Division of the High Court, appointed for the purpose by the Lord Chief Justice with the consent of the Lord Chancellor for such period as he thinks desirable in each case, shall be judges of that Court.

(2) For the purpose of hearing and determining appeals under this Act, and for the purpose of any other proceedings under this Act, the Court of Criminal Appeal shall be summoned in accordance with directions given by the Lord Chief Justice of England with the consent of the Lord Chancellor, and the Court shall be duly constituted if it consists of not less than three judges and of an uneven number of judges.

If the Lord Chief Justice so directs, the Court may sit in two or more divisions.

The Court shall sit in London except in cases where the Lord Chief Justice gives special directions that it shall sit at some other place.

(3) The Lord Chief Justice, if present, and in his absence the senior member of the Court, shall be president of the Court.

(4) The determination of any question before the Court of Criminal Appeal shall be according to the opinion of the majority of the members of the Court hearing the case.

(5) Unless the Court direct to the contrary in cases where, in the opinion of the Court, the question is a question of law on which it would be convenient that separate judgments should be pronounced by the members of the Court, the judgment of the Court shall be pronounced by the president of the Court or such other member of the Court hearing the case as the president of the Court directs, and no judgment with respect to the determination of any question shall be separately pronounced by any other member of the Court.

(6) If in any case the director of public prosecutions or the prosecutor or defendant obtains the certificate of the Attorney-General that the decision of the Court of Criminal Appeal involves a point of law of exceptional public importance, and that it is desirable in the public interest that a further appeal should be brought, he may appeal from that decision to the House of Lords, but subject thereto the determination by the Court of Criminal Appeal of any appeal or other matter which it has power to determine shall be final, and no appeal shall lie from that Court to any other Court.

(7) The Court of Criminal Appeal shall be a superior Court of record, and shall, for the purposes of and subject to the provisions of this Act, have full power to determine, in accordance with this Act, any questions necessary to be determined for the purpose of doing justice in the case before the Court.

(8) Rules of Court shall provide for securing sittings of the Court of Criminal Appeal, if necessary, during vacation.

(9) Any direction which may be given by the Lord Chief Justice under this section may, in the event of any vacancy in that office, or in the event of the incapacity of the Lord Chief Justice to act from any reason, be given by the senior judge of the Court of Criminal Appeal.

Registrar of the Court of Criminal Appeal.

2. There shall be a Registrar of the Court of Criminal Appeal (in this Act referred to as the Registrar) who shall be appointed by the Lord Chief Justice from among the Masters of the Supreme

Court acting in the King's Bench Division, and shall be entitled to such additional salary (if any), and be provided with such additional staff (if any), in respect of the office of Registrar as the Lord Chancellor, with the concurrence of the Treasury, may determine.

The senior Master of the Supreme Court shall be the first Registrar.

Right of Appeal and Determination of Appeals.

Right of appeal in criminal cases.

3. A person convicted on indictment may appeal under this Act to the Court of Criminal Appeal—

(a) against his conviction on any ground of appeal which involves a question of law alone; and

(b) with the leave of the Court of Criminal Appeal or upon the certificate of the judge who tried him that it is a fit case for appeal against his conviction on any ground of appeal which involves a question of fact alone, or a question of mixed law and fact, or any other ground which appears to the Court to be a sufficient ground of appeal; and

(c) with the leave of the Court of Criminal Appeal against the sentence passed on his conviction, unless the sentence is one fixed by law.

Determination of appeals in ordinary cases.

4.—(1) The Court of Criminal Appeal on any such appeal against conviction shall allow the appeal if they think that the verdict of the jury should be set aside on the ground that it is unreasonable or cannot be supported having regard to the evidence, or that the judgment of the Court before whom the appellant was convicted should be set aside on the ground of a wrong decision of any question of law or that on any ground there was a miscarriage of justice, and in any other case shall dismiss the appeal:

Provided that the Court may, notwithstanding that they are of opinion that the point raised in the appeal might be decided in favour of the appellant, dismiss the appeal if they consider that no substantial miscarriage of justice has actually occurred.

(2) Subject to the special provisions of this Act, the Court of Criminal Appeal shall, if they allow an appeal against conviction,

quash the conviction and direct a judgment and verdict of acquittal to be entered.

(3) On an appeal against sentence the Court of Criminal Appeal shall, if they think that a different sentence should have been passed, quash the sentence passed at the trial, and pass such other sentence warranted in law by the verdict (whether more or less severe) in substitution therefor as they think ought to have been passed, and in any other case shall dismiss the appeal.

Powers of Court in special cases.

5.—(1) If it appears to the Court of Criminal Appeal that an appellant, though not properly convicted on some count or part of the indictment, has been properly convicted on some other count or part of the indictment, the Court may either affirm the sentence passed on the appellant at the trial, or pass such sentence in substitution therefor as they think proper, and as may be warranted in law by the verdict on the count or part of the indictment on which the Court consider that the appellant has been properly convicted.

(2) Where an appellant has been convicted of an offence and the jury could on the indictment have found him guilty of some other offence, and on the finding of the jury it appears to the Court of Criminal Appeal that the jury must have been satisfied of facts which proved him guilty of that other offence, the Court may, instead of allowing or dismissing the appeal, substitute for the verdict found by the jury a verdict of guilty of that other offence, and pass such sentence in substitution for the sentence passed at the trial as may be warranted in law for that other offence, not being a sentence of greater severity.

(3) Where on the conviction of the appellant the jury have found a special verdict, and the Court of Criminal Appeal consider that a wrong conclusion has been arrived at by the Court before which the appellant has been convicted on the effect of that verdict, the Court of Criminal Appeal may, instead of allowing the appeal, order such conclusion to be recorded as appears to the Court to be in law required by the verdict, and pass such sentence in substitution for the sentence passed at the trial as may be warranted in law.

(4) If on any appeal it appears to the Court of Criminal

Appeal that, although the appellant was guilty of the act or omission charged against him, he was insane at the time the act was done or omission made so as not to be responsible according to law for his actions, the Court may quash the sentence passed at the trial and order the appellant to be kept in custody as a criminal lunatic under the Trial of Lunatics Act, 1883, in the same manner as if a special verdict had been found by the jury under that Act.

46 & 47 Vict. c. 38.

Re-vesting and restitution of property on conviction.

56 & 57 Vict. c. 71.

6. The operation of any order for the restitution of any property to any person made on a conviction on indictment, and the operation in case of any such conviction, of the provisions of sub-section (1) of section twenty-four of the Sale of Goods Act, 1893, as to the re-vesting of the property in stolen goods on conviction, shall (unless the Court before whom the conviction takes place direct to the contrary in any case in which, in their opinion, the title to the property is not in dispute) be suspended—

(a) in any case until the expiration of ten days after the date of the conviction; and

(b) in cases where notice of appeal or leave to appeal is given within ten days after the date of conviction, until the determination of the appeal;

and in cases where the operation of any such order, or the operation of the said provisions, is suspended until the determination of the appeal, the order or provisions, as the case may be, shall not take effect as to the property in question if the conviction is quashed on appeal. Provision may be made by rules of Court for securing the safe custody of any property, pending the suspension of the operation of any such order or of the said provisions.

(2) The Court of Criminal Appeal may by order annul or vary any order made on a trial for the restitution of any property to any person, although the conviction is not quashed; and the order, if annulled, shall not take effect, and, if varied, shall take effect as so varied.

PROCEDURE.

Time for appealing.

7.—(1) Where a person convicted desires to appeal under this Act to the Court of Criminal Appeal, or to obtain the leave of that

Court to appeal, he shall give notice of appeal or notice of his application for leave to appeal in such manner as may be directed by rules of Court within ten days of the date of conviction: Such rules shall enable any convicted person to present his case and his argument in writing instead of by oral argument if he so desires. Any case or argument so presented shall be considered by the Court.

Except in the case of a conviction involving sentence of death, the time within which notice of appeal or notice of an application for leave to appeal may be given, may be extended at any time by the Court of Criminal Appeal.

(2) In the case of a conviction involving sentence of death or corporal punishment—

(a) the sentence shall not in any case be executed until after the expiration of the time within which notice of appeal or of an application for leave to appeal may be given under this section; and

(b) if notice is so given, the appeal or application shall be heard and determined with as much expedition as practicable, and the sentence shall not be executed until after the determination of the appeal, or, in cases where an application for leave to appeal is finally refused, of the application.

Judge's notes and report to be furnished on appeal.

8. The judge or chairman of any Court before whom a person is convicted shall, in the case of an appeal under this Act against the conviction or against the sentence, or in the case of an application for leave to appeal under this Act, furnish to the Registrar, in accordance with rules of Court, his notes of the trial; and shall also furnish to the Registrar in accordance with rules of Court a report giving his opinion upon the case or upon any point arising in the case.

Supplemental powers of Court.

9. For the purposes of this Act, the Court of Criminal Appeal may, if they think it necessary or expedient in the interest of justice,—

(a) order the production of any document, exhibit, or other thing connected with the proceedings, the production of

which appears to them necessary for the determination of the case; and

(b) if they think fit order any witnesses who would have been compellable witnesses at the trial to attend and be examined before the Court, whether they were or were not called at the trial, or order the examination of any such witnesses to be conducted in manner provided by rules of Court before any judge of the Court or before any officer of the Court or justice of the peace or other person appointed by the Court for the purpose, and allow the admission of any depositions so taken as evidence before the Court; and

(c) if they think fit receive the evidence, if tendered, of any witness (including the appellant) who is a competent but not compellable witness, and, if the appellant makes an application for the purpose, of the husband or wife of the appellant, in cases where the evidence of the husband or wife could not have been given at the trial except on such an application; and

(d) where any question arising on the appeal involves prolonged examination of documents or accounts, or any scientific or local investigation, which cannot in the opinion of the Court conveniently be conducted before the Court, order the reference of the question in manner provided by rules of Court for inquiry and report to a special commissioner appointed by the Court, and act upon the report of any such commissioner so far as they think fit to adopt it; and

(e) appoint any person with special expert knowledge to act as assessor to the Court in any case where it appears to the Court that such special knowledge is required for the proper determination of the case;

and exercise in relation to the proceedings of the Court any other powers which may for the time being be exercised by the Court of Appeal on appeals in civil matters, and issue any warrants necessary for enforcing the orders or sentences of the Court: Provided that in no case shall any sentence be increased by reason

of or in consideration of any evidence that was not given at the trial.

Legal assistance to appellant.

10. The Court of Criminal Appeal may at any time assign to an appellant a solicitor and counsel or counsel only in any appeal or proceedings preliminary or incidental to an appeal in which, in the opinion of the Court, it appears desirable in the interests of justice that the appellant should have legal aid, and that he has not sufficient means to enable him to obtain that aid.

Right of appellant to be present.

11.—(1) An appellant, notwithstanding that he is in custody, shall be entitled to be present, if he desires it, on the hearing of his appeal, except where the appeal is on some ground involving a question of law alone, but, in that case and on an application for leave to appeal and on any proceedings preliminary or incidental to an appeal, shall not be entitled to be present, except where rules of Court provide that he shall have the right to be present, or where the Court gives him leave to be present.

(2) The power of the Court to pass any sentence under this Act may be exercised notwithstanding that the appellant is for any reason not present.

Duty of Director of Public Prosecutions.

12. It shall be the duty of the Director of Public Prosecutions to appear for the Crown on every appeal to the Court of Criminal Appeal under this Act, except so far as the solicitor of a Government department, or a private prosecutor in the case of a private prosecution, undertakes the defence of the appeal, and the Prosecution of Offences Act, 1879, shall apply as though the duty of the Director of Public Prosecutions under this section were a duty under section two of that Act, and provision shall be made by rules of Court for the transmission to the Director of Public Prosecutions of all such documents, exhibits, and other things connected with the proceedings as he may require for the purpose of his duties under this section.

42 & 43 Vict. c. 22.

Costs of appeal.

13.—(1) On the hearing and determination of an appeal or any proceedings preliminary or incidental thereto under this Act no costs shall be allowed on either side.

(2) The expenses of any solicitor or counsel assigned to an appellant under this Act, and the expenses of any witnesses attending on the order of the Court or examined in any pro-

ceedings incidental to the appeal, and of the appearance of an appellant on the hearing of his appeal or on any proceedings preliminary or incidental to the appeal, and all expenses of and incidental to any examination of witnesses conducted by any person appointed by the Court for the purpose, or any reference of a question to a special commissioner appointed by the Court, or of any person appointed as assessor to the Court, shall be defrayed, up to an amount allowed by the Court, but subject to any regulations as to rates and scales of payment made by the Secretary of State, in the same manner as the expenses of a prosecution in cases of felony.

Admission of appellant to bail, and custody when attending Court. 61 & 62 Vict. c. 41.

14.—(1) An appellant who is not admitted to bail shall, pending the determination of his appeal, be treated in such manner as may be directed by prison rules within the meaning of the Prison Act, 1898.

(2) The Court of Criminal Appeal may, if it seems fit, on the application of an appellant, admit the appellant to bail pending the determination of his appeal.

(3) The time during which an appellant, pending the determination of his appeal, is admitted to bail, and subject to any directions which the Court of Criminal Appeal may give to the contrary on any appeal, the time during which the appellant, if in custody, is specially treated as an appellant under this section, shall not count as part of any term of imprisonment or penal servitude under his sentence, and, in the case of an appeal under this Act, any imprisonment or penal servitude under the sentence of the appellant, whether it is the sentence passed by the Court of trial or the sentence passed by the Court of Criminal Appeal, shall, subject to any directions which may be given by the Court as aforesaid, be deemed to be resumed or to begin to run, as the case requires, if the appellant is in custody, as from the day on which the appeal is determined, and, if he is not in custody, as from the day on which he is received into prison under the sentence.

11 & 12 Vict. c. 78.

(4) Where a case is stated under the Crown Cases Act, 1848, this section shall apply to the person in relation to whose conviction the case is stated as it applies to an appellant.

(5) Provision shall be made by prison rules within the meaning

of the Prison Act, 1898, for the manner in which an appellant, when in custody, is to be brought to any place at which he is entitled to be present for the purposes of this Act, or to any place to which the Court of Criminal Appeal or any judge thereof may order him to be taken for the purpose of any proceedings of that Court, and for the manner in which he is to be kept in custody while absent from prison for the purpose; and an appellant whilst in custody in accordance with those rules shall be deemed to be in legal custody.

Duties of registrar with respect to notices of appeal, &c.

15.—(1) The registrar shall take all necessary steps for obtaining a hearing under this Act of any appeals or applications, notice of which is given to him under this Act, and shall obtain and lay before the Court in proper form all documents, exhibits, and other things relating to the proceedings in the Court before which the appellant or applicant was tried which appear necessary for the proper determination of the appeal or application.

(2) If it appears to the registrar that any notice of an appeal against a conviction purporting to be on a ground of appeal which involves a question of law alone does not show any substantial ground of appeal, the registrar may refer the appeal to the Court for summary determination, and, where the case is so referred, the Court may, if they consider that the appeal is frivolous or vexatious, and can be determined without adjourning the same for a full hearing, dismiss the appeal summarily, without calling on any persons to attend the hearing or to appear for the Crown thereon.

(3) Any documents, exhibits, or other things connected with the proceedings on the trial of any person on indictment, who, if convicted, is entitled or may be authorised to appeal under this Act, shall be kept in the custody of the Court of trial in accordance with rules of Court made for the purpose, for such time as may be provided by the rules, and subject to such power as may be given by the rules for the conditional release of any such documents, exhibits, or things from that custody.

(4) The registrar shall furnish the necessary forms and instructions in relation to notices of appeal or notices of application under this Act to any person who demands the same, and to

officers of Courts, governors of prisons, and such other officers or persons as he thinks fit, and the governor of a prison shall cause those forms and instructions to be placed at the disposal of prisoners desiring to appeal or to make any application under this Act, and shall cause any such notice given by a prisoner in his custody to be forwarded on behalf of the prisoner to the registrar.

(5) The registrar shall report to the Court or some judge thereof any case in which it appears to him that, although no application has been made for the purpose, a solicitor and counsel or counsel only ought to be assigned to an appellant under the powers given to the Court by this Act.

Shorthand notes of trial.

16.—(1) Shorthand notes shall be taken of the proceedings at the trial of any person on indictment who, if convicted, is entitled or may be authorised to appeal under this Act, and on any appeal or application for leave to appeal a transcript of the notes or any part thereof shall be made if the registrar so directs, and furnished to the registrar for the use of the Court of Criminal Appeal or any judge thereof: Provided that a transcript shall be furnished to any party interested upon the payment of such charges as the Treasury may fix.

(2) The Secretary of State may also, if he thinks fit in any case, direct a transcript of the shorthand notes to be made and furnished to him for his use.

(3) The cost of taking any such shorthand notes, and of any transcript where a transcript is directed to be made by the registrar or by the Secretary of State, shall be defrayed, in accordance with scales of payment fixed for the time being by the Treasury, out of moneys provided by Parliament, and rules of Court may make such provision as is necessary for securing the accuracy of the notes to be taken and for the verification of the transcript.

Powers which may be exercised by a judge of the Court.

17. The powers of the Court of Criminal Appeal under this Act to give leave to appeal, to extend the time within which notice of appeal or of any application for leave to appeal may be given, to assign legal aid to an appellant, to allow the appellant to be present at any proceedings in cases where he is not entitled to be present without leave, and to admit an appellant

to bail, may be exercised by any judge of the Court of Criminal Appeal in the same manner as they may be exercised by the Court, and subject to the same provisions; but, if the judge refuses an application on the part of the appellant to exercise any such power in his favour, the appellant shall be entitled to have the application determined by the Court of Criminal Appeal as duly constituted for the hearing and determining of appeals under this Act.

Rules of Court.

18.—(1) Rules of Court for the purposes of this Act shall be made, subject to the approval of the Lord Chancellor, and so far as the rules affect the governor or any other officer of a prison, or any officer having the custody of an appellant, subject to the approval also of the Secretary of State, by the Lord Chief Justice and the judges of the Court of Criminal Appeal, or any three of such judges, with the advice and assistance of the Committee hereinafter mentioned. Rules so made may make provision with respect to any matter for which provision is to be made under this Act by rules of Court, and may regulate generally the practice and procedure under this Act, and the officers of any Court before whom an appellant has been convicted, and the governor or other officers of any prison or other officer having the custody of an appellant and any other officers or persons, shall comply with any requirements of those rules so far as they affect those officers or persons, and compliance with those rules may by enforced by order of the Court of Criminal Appeal.

(2) The Committee herein-before referred to shall consist of a chairman of quarter sessions appointed by a Secretary of State, the Permanent Under Secretary of State for the time being for the Home Department, the Director of Public Prosecutions for the time being, the Registrar of the Court of Criminal Appeal, and a clerk of assize, and a clerk of the peace appointed by the Lord Chief Justice, and a solicitor appointed by the President of the Law Society for the time being, and a barrister appointed by the General Council of the Bar. The term of office of any person who is a member of the Committee by virtue of appointment shall be such as may be specified in the appointment.

(3) Every rule under this Act shall be laid before each House

of Parliament forthwith, and, if an address is presented to His Majesty by either House of Parliament within the next subsequent thirty days on which the House has sat next after any such rule is laid before it, praying that the rule may be annulled, His Majesty in Council may annul the rule, and it shall thenceforth be void, but without prejudice to the validity of anything previously done thereunder.

SUPPLEMENTAL.

Prerogative of mercy.

19. Nothing in this Act shall affect the prerogative of mercy, but the Secretary of State on the consideration of any petition for the exercise of His Majesty's mercy, having reference to the conviction of a person on indictment or to the sentence (other than sentence of death) passed on a person so convicted, may, if he thinks fit, at any time either—

(a) refer the whole case to the Court of Criminal Appeal, and the case shall then be heard and determined by the Court of Criminal Appeal as in the case of an appeal by a person convicted; or

(b) if he desires the assistance of the Court of Criminal Appeal on any point arising in the case with a view to the determination of the petition, refer that point to the Court of Criminal Appeal for their opinion thereon, and the Court shall consider the point so referred and furnish the Secretary of State with their opinion thereon accordingly.

Criminal informations, procedure in the High Court, &c.

20.—(1) Writs of error, and the powers and practice now existing in the High Court in respect of motions for new trials or the granting thereof in criminal cases, are hereby abolished.

(2) This Act shall apply in the case of convictions on criminal informations and coroners' inquisitions and in cases where a person is dealt with by a Court of quarter sessions as an incorrigible rogue under the Vagrancy Act, 1824, as it applies in the case of convictions on indictments, but shall not apply in the case of convictions on indictments or inquisitions charging any peer or peeress, or other person claiming the privilege of peerage, with any offence not now lawfully triable by a Court of Assize.

5 Geo. 4. c. 83.

(3) Notwithstanding anything in any other Act, an appeal shall lie from a conviction on indictment at common law in relation to the non-repair or obstruction of any highway, public bridge, or navigable river in whatever Court the indictment is tried, in all respects as though the conviction were a verdict in a civil action tried at assizes, and shall not lie under this Act.

(4) All jurisdiction and authority under the Crown Cases Act, 1848, in relation to questions of law arising in criminal trials which is transferred to the judges of the High Court by section forty-seven of the Supreme Court of Judicature Act, 1873, shall be vested in the Court of Criminal Appeal under this Act, and in any case where a person convicted appeals under this Act against his conviction on any ground of appeal which involves a question of law alone, the Court of Criminal Appeal may, if they think fit, decide that the procedure under the Crown Cases Act, 1848, as to the statement of a case should be followed, and require a case to be stated accordingly under that Act in the same manner as if a question of law had been reserved. 36 & 37 Vict. c. 66.

21. In this Act, unless the context otherwise requires,— Definitions.

The expression 'appellant" includes a person who has been convicted and desires to appeal under this Act; and

The expression "sentence" includes any order of the Court made on conviction with reference to the person convicted or his wife or children, and any recommendation of the Court as to the making of an expulsion order in the case of a person convicted, and the power of the Court of Criminal Appeal to pass a sentence includes a power to make any such order of the Court or recommendation, and a recommendation so made by the Court of Criminal Appeal shall have the same effect for the purposes of section three of the Aliens Act, 1905, as the certificate and recommendation of the convicting Court. 5 Edw. 7, c. 13.

22. The Acts specified in the schedule to this Act are hereby repealed to the extent mentioned in the third column of that schedule. Repeal.

23.—(1) This Act may be cited as the Criminal Appeal Act, 1907. Short title, extent, and application.

(2) This Act shall not extend to Scotland or Ireland.

(3) This Act shall apply to all persons convicted after the eighteenth day of April nineteen hundred and eight, but shall not affect the rights, as respects appeal, of any persons convicted on or before that date.

SCHEDULE.

Enactments Repealed.

Session and Chapter.	Short Title.	Extent of Repeal.
7 & 8 Will. 3, c. 3.	The Treason Act, 1695..	In section nine, from "but nevertheless" to the end of the section.
11 & 12 Vict. c. 78.	The Crown Cases Act, 1848.	Sections three and five.
38 & 39 Vict. c. 77.	The Supreme Court of Judicature Act, 1875.	In section nineteen, the words "including the practice and procedure with respect to Crown cases reserved."
44 & 45 Vict. c. 68.	The Supreme Court of Judicature Act, 1881.	Section fifteen.

COSTS IN CRIMINAL CASES ACT, 1908.

(8 Edw. 7, c. 15.)

9.—(5) For the purpose of section thirteen of the Criminal Appeal Act, 1907 (which relates to the costs of appeal), the hearing of a case stated under the Crown Cases Act, 1848, shall be deemed to be an appeal, and the person in relation to whose conviction the case is stated shall be deemed to be an appellant, and the provisions of this Act giving power to direct the payment of the costs of the prosecution and defence shall not apply to the hearing of any case so stated. 7 Edw. 7, c. 23. 11 & 12 Vict. c. 78.

(6) A reference to the payment of costs out of local funds under this Act shall be substituted for any reference to the payment of expenses in the case of an indictment for felony, or in cases of felony, or in the case of a misdemeanour under the Criminal Law Act, 1826, or any like reference in section one of the Inebriates Act, 1899, or in section thirteen of the Criminal Appeal Act, 1907, or in any other enactment. 62 & 63 Vict. c. 35. 7 Edw. 7, c. 23. 7 Geo. 4, c. 64. 62 & 63 Vict. c. 35.

CRIMINAL APPEAL (AMENDMENT) ACT, 1908.

(8 Edw. 7, c. 46.)

An Act to amend the Criminal Appeal Act, 1907, *with reference to the Judges of the Court of Criminal Appeal and the Registrar.* [21st December, 1908.]

Be it enacted by the King's most Excellent Majesty, by and with the advice and consent of the Lords Spiritual and Temporal, and Commons, in this present Parliament assembled, and by the authority of the same, as follows :—

Judges of the Court of Criminal Appeal. 7 Edw. 7, c. 23.

1. Notwithstanding anything in section one of the Criminal Appeal Act, 1907, all the judges of the King's Bench Division of the High Court shall be judges of the Court of Criminal Appeal.

Registrar of the Court of Criminal Appeal.

2.—(1) Notwithstanding anything in section two of the Criminal Appeal Act, 1907, from and after the passing of this Act the Master of the Crown Office shall be the Registrar of the Court of Criminal Appeal.

(2) The power to provide additional staff for the Registrar of the Court of Criminal Appeal includes a power to appoint an Assistant Registrar, but any Assistant Registrar so appointed shall be either a Master of the Supreme Court acting in the King's Bench Division or a practising barrister of not less than seven years' standing, and shall be appointed by the Lord Chief Justice of England.

Short title.

3. This Act may be cited as the Criminal Appeal (Amendment) Act, 1908.

PREVENTION OF CRIME ACT, 1908.

(8 Edw. 7, c. 59.)

11. A person sentenced to preventive detention may, notwithstanding anything in the Criminal Appeal Act, 1907, appeal against the sentence without the leave of the Court of Criminal Appeal.

Appeal against sentence to Court of Criminal Appeal.
7 Edw. 7, c. 23.

CHILDREN ACT.

(8 Edw. 7, c. 67.)

99.—(6) A parent or guardian may appeal against an order under this section—

(b) if made by a Court of Assize or a Court of Quarter Sessions to the Court of Criminal Appeal, in accordance with the Criminal Appeal Act, 1907, as if the parent or guardian against whom the order was made had been convicted on indictment, and the order were a sentence passed on his conviction.

CRIMINAL APPEAL CASES.

REPORTS OF CASES

IN

THE COURT OF CRIMINAL APPEAL,

MAY 15, MAY 18.

EDITED BY

HERMAN COHEN,

OF THE INNER TEMPLE, BARRISTER-AT-LAW.

LONDON:

STEVENS AND HAYNES,

Law Publishers,

BELL YARD, TEMPLE BAR.

1908.

COURT OF CRIMINAL APPEAL.

May 15, 1908.

BEFORE THE

LORD CHIEF JUSTICE, MR. JUSTICE CHANNELL, MR. JUSTICE A. T. LAWRENCE.

T. H. WILLIAMSON.

Application for leave to appeal—Verdict against the weight of evidence.

1908
15 *May*.
T. H. Williamson.

Danford Thomas, for the appellant (under sect. 15 (5) of the Criminal Appeal Act), who was convicted before the Common Serjeant at the Central Criminal Court on April 30 of wounding with intent to do grievous bodily harm, and sentenced to twelve months' imprisonment with hard labour. As to the evidence of the provocation for the actual assault, this is a case of oath against oath. Appellant's evidence was that he acted in self-defence.

The LORD CHIEF JUSTICE: There was abundant evidence to go to the jury. The onus is on the appellant to show that the verdict ought not to stand. There ought not to be a re-trial where only proper evidence has been left to the jury.

Appeal dismissed.

1908
15 *May.*

P. Meyer.

P. MEYER.

Application for leave to appeal—Misdirection: Larceny or false pretences.

L. Kershaw, for the appellant (under sect. 15 (5) of the Criminal Appeal Act), who was convicted before the Deputy-Chairman at the North London Sessions on April 29 of larceny of a ring, and sentenced to twelve months' imprisonment with hard labour and recommended for expulsion: The summing-up (read) does not show whether the Crown alleged larceny by a bailee or larceny by a trick. The jury were not properly directed whether the felonious intent was formed on delivery or subsequently, and might have convicted because they thought appellant was guilty of false pretences, or of converting the proceeds of the ring.

Leave to appeal granted.

On application for bail the Court referred appellant to the single judge (Channell, J.).

G. Crawley.

G. CRAWLEY.

Application for leave to appeal against sentence—Appeal against refusal of legal aid.

Appellant, in person: He had been convicted before the Chairman of the North London Sessions on April 28 of larceny, and sentenced to five years' penal servitude. He had been convicted eighteen times previously, and twice sentenced to penal servitude.

Leave refused.

The Lord Chief Justice: Legal aid was properly refused in this case. On appeal against sentence (alone) legal aid will only be granted exceptionally.

W.H.Munns.

W. H. MUNNS.

Application for leave to appeal—Verdict against the weight of evidence.

Appellant, in person: He had sent in a written statement, which he now supplemented orally.

Curtis Bennett, for the Crown, at the request of the Court, stated the facts.

Leave refused.

The Lord Chief Justice pointed out that under sect. 17 of the Criminal Appeal Act the single judge had power (though he was not bound) to refer to the Court applications for leave to appeal, and he might properly do so until the principle on which such leave should be granted is settled.

1908
15 *May*.
W. H. Munns.

J. LEE.

J. Lee.

Appeal on certificate of judge—Verdict against the weight of evidence—Confession of a previous conviction.

Herman Cohen, for the appellant (under sect. 15 (5) of the Criminal Appeal Act), who was convicted before the Common Serjeant at the Central Criminal Court on April 28 of feloniously uttering a counterfeit coin after a previous conviction for misdemeanour, and sentenced to twelve months' imprisonment with hard labour. The judge at the trial had certified that he was dissatisfied with the verdict. Only one bad coin, admitted by the Mint authority to be a good imitation, was found in appellant's possession; all the other money found on him (about ten shillings) was good. It had come out in evidence that the barmaid to whom the coin had been tendered on April 6 had sworn that he was the same man who had given her another bad coin a fortnight before, and though this was admitted at the trial to be a mistake the jury could not know why this must be a mistake, and they had suggested that appellant should give evidence. This he had done, and had explained that he was in prison when the (earlier) bad coin had been uttered. It was admitted that he had been discharged from prison on April 4. Probably this fact had influenced the jury to convict. The judge had only left the case to the jury because it was said that when appellant was followed just after the coin was uttered, after some considerable distance, he had begun to run away, but counsel did not think this point worth arguing.

Sands, for the Crown: This verdict could not be called perverse, and, therefore, the Court ought not to disturb it. One bad coin was enough in law for a conviction. He dealt with the evidence of appellant's beginning to run away.

Cohen, in reply: It was admitted that after a time appellant had begun to run, but he had not been asked a word about this in cross-

1908
15 *May.*
J. Lee.

examination; he had explained that he was "upset" by the accusation—as well might be the case—as he knew that his record was bad. Moreover, flight proved nothing as to guilt. There was not a scintilla of evidence to show that he had "knowingly" uttered the coin, and, therefore, the conviction could not stand.

The Lord Chief Justice said that in law one bad coin uttered was quite enough for a conviction. But the new Act must not be allowed to make any difference in the principle that the presumption of innocence can only be rebutted by evidence of the specific offence charged. Here, perhaps, the jury had been influenced by the appellant's own confession of some previous conviction; they ought, having heard of it, to have been expressly warned not to take it into account, and, perhaps, it might have been suggested to the Counsel for the Crown that it would not be safe to proceed on the evidence as it stood, and he would, doubtless, have acquiesced. This was an exceptional case and not likely to form a precedent, but there had been "a miscarriage of justice" within sect. 4 of the Act and the conviction must be quashed.

Conviction quashed.

F. Hibberd.

F. HIBBERD.

Appeal against sentence.

Appellant had sent in a written statement and was not present; his statement was read by *Burnie*, who appeared for the Crown. He had pleaded guilty on April 29 before the Chairman of the North London Sessions to stealing motor clothing of the value of 100*l.*, and had been sentenced to three years' penal servitude. There were four previous convictions since 1901.

Appeal dismissed.

M. Laws.

M. LAWS.

Appeal on certificate of judge—Verdict against weight of evidence—Alibi—Fresh evidence.

D. Warde, for the appellant (under sect. 15 (5) of the Criminal Appeal Act), who was on bail: He was convicted with two others before Commissioner Lumley Smith at the Central Criminal Court

1908
15 *May.*
M. Laws.

on May 1st of assault with intent to rob, and sentenced to six months' imprisonment in the second division, but the judge certified that he was dissatisfied with the verdict.

At about twenty (or, as some witnesses put it, ten) minutes to one in the night Mr. and Mrs. Scott were attacked by roughs. Mrs. Scott swore that she identified appellant as one of the actual assailants, and her husband thought that he was in the surrounding crowd, and a constable also thought so. The latter also thought that appellant followed the Scotts with the other two men, but was not certain. About 75 yards further on the assault was renewed, and Mrs. Scott positively identified him again as assisting in it, but Mr. Scott was not certain. One Thacker swore positively to appellant as one of the three men, stating that an adjacent electric light enabled him to see, and later, at about 2.45 a.m., both he and Mrs. Scott identified him as he was attempting to get into his father's house—distant about ten minutes' walk from the scene of the assault—and he was then arrested. The defence was an alibi.

The father, the mother, and two brothers of appellant swore that he had spent the evening at home with them in a family festivity, and a neighbour deposed that he recognised appellant's voice singing up to 1 a.m. Appellant and his father swore as to the time by a clock and a watch respectively. About 1 a.m. appellant was in an excitable state, and policemen were fetched to remove him from outside the door, and they escorted him some distance. These constables were not called. The appellant returned at 1.30, and another constable was fetched, and he was called. Ultimately appellant returned again, and it was then that he was arrested. His character was good.

W. S. M. Knight, for the Crown, commented on this evidence, and added that when arrested appellant was covered with clay and dirt. Thacker's evidence was that, in escaping, appellant had rolled down an embankment. No alibi had been set up at the Police Court nor at the Central Criminal Court till appellant went into the box.

Upon its appearing that the constables who first went to the house of Laws, senr., had not been called at the trial, *Warde* applied that the Court should order inquiries to be made with the view of their being called or their report (if any) being produced.

The Court retired to consider its decision, and on its return ordered (under sect. 9 (b) of the Criminal Appeal Act) the Director

1908
18 *May.*
M. Laws.

of Public Prosecutions to make the necessary inquiries and to have the requisite witnesses in attendance on the following Monday. Accordingly,

May 18.—The constable who was first fetched to the house was called and sworn. Examined by *Knight*, he said that this was at 1 a.m., and he had so reported to his superior officer.

Warde declined to cross-examine.

The superior officer in question sworn, and examined by *Knight*, produced the report, which gave 1 a.m. as the time.

A sergeant, called at the trial, now swore that he had measured the distance from the house in question to the scene of the assault since the last sitting of the Court, and it was 750 yards.

Knight was invited to comment on the *fresh* evidence. *Warde* proposed to call another witness, but the Lord Chief Justice said that, though the Court had exercised its power of calling witnesses, counsel could not do so without first obtaining leave.

The Lord Chief Justice gave judgment that this conviction must be quashed. He was not, however, surprised at the verdict, and had it not been for the fresh independent evidence of the police that day that Court would not have interfered. The defence had been started at the last moment, when there was no means of testing it. It was astonishing that the defence did not have this police evidence of the alibi ready at the trial. Prisoners, through unfortunate advice, sometimes thought that they gained by keeping back their story till the last moment, often because it was not true: they had much better bring out the whole story at first. This was a case of great suspicion, having regard to the way in which appellant was found the same night getting into his father's house; but the independent testimony of the police established the alibi.

At the preceding sitting, when the conviction was quashed, the Home Secretary would probably have released the prisoner in forty-eight hours, and in this he would never have been in prison at all.

Conviction quashed.

Warde asked the Court to order another indictment against the appellant in respect of the same assault to be removed from the file of the Court below, but the Lord Chief Justice said this Court had no power to do so.

BEFORE THE

LORD CHIEF JUSTICE, MR. JUSTICE LAWRANCE, AND MR. JUSTICE RIDLEY.

CHARLES BAKER.

Application for leave to appeal against sentence.

1908
22 *May.*
Charles Baker.

Eustace Fulton, for the appellant (under sect. 15 (5) of the Criminal Appeal Act), who pleaded guilty before A. T. Lawrence J. at the Central Criminal Court on April 27 of wounding with intent to do grievous bodily harm, and was sentenced to three years' penal servitude (a count for wounding with intent to murder not having been proceeded with), stated the facts.

The grounds of appeal alleged that the act was unpremeditated and brought about by a sudden provocation.

The appellant, a barman, was engaged to the daughter of his late employer. The girl's parents were hostile to the engagement, and the meetings and correspondence were carried on in secret for some months. The appellant was threatened and finally assaulted by the girl's brother. In December he bought a revolver, which he alleged was purchased for self-defence. A few days later he wrote a letter to a relative, which was never posted and afterwards found by the police, hinting at a crime that he was about to commit. The girl's name was not mentioned in the letter, and the appellant alleged that he was contemplating suicide only in consequence of the hopeless character of his suit.

About this time an accusation against appellant was made by members of the girl's family, and was noted by her in a series of letters written to the appellant. A few days before Jan. 27, when the matter (as against a third person) was coming into court, the girl, fearing that these letters would be produced in court, wrote asking the appellant to return them. At the same time some one told him that the girl was going out with another man, and was only continuing her relations with him until after the hearing of the summons in order that he might not produce the letters. On Jan. 26 the appellant wrote to a relative again hinting at the commission of a crime and asking forgiveness. This letter he also alleged was a threat of suicide only. On Jan. 27 he went with the letters to the public-house where the girl lived, and spoke to her over the bar. The girl suddenly snatched the letters and ran out of the bar and burnt them. The appellant followed and fired at her twice, the first bullet slightly wounding her in the breast, the

1908
22 *May.*
Charles Baker.

second entering under her arm and lodging near the spine. The appellant then shot himself twice in the mouth.

The LORD CHIEF JUSTICE: The prisoner has been treated with leniency. There was evidence on which he might have been tried on the graver offence, as his letters showed that at one time he contemplated violence against the girl. The judge, as he was bound to do, in passing sentence had taken all the facts into consideration. The fact that he had attempted suicide could not be taken into account, as that was itself a serious crime.

Application refused.

Robert Williams.

ROBERT WILLIAMS.

Application for legal aid and bail—Appeal against sentence.

Appellant, who was not present, wished to appeal against sentence, but the single judge (Ridley J.) had refused both his applications.

The LORD CHIEF JUSTICE stated that the Court had read his papers.

Application refused.

Joseph Francis Dowling.

JOSEPH FRANCIS DOWLING.

Appeal against sentence.

P. Clarke, for appellant (under sect. 15 (5) of the Criminal Appeal Act), who was sentenced on April 21 to six months' hard labour for larceny and burglary by the Deputy Chairman of the West Derby Hundred (Liverpool) Quarter Sessions, and who had been granted leave to appeal by Channell, J., asked leave to withdraw the appeal.

O. G. Morris, for the Crown.

Appeal by leave withdrawn.

Peter Meyer.

PETER MEYER (*a*).

Misdirection, a point of law—Larceny or false pretences—"Miscarriage of justice."

L. Kershaw, for the appellant. The facts of the case were as follows:—The prosecutor and a friend had met the prisoner, and had asked him to raise money on a ring, giving him leave

(*a*) See p. 4, above.

1908
22 *May.*
Peter Meyer.

either to sell or to pawn it. He tried unsuccessfully to do so, and then went into a public-house in which he said he knew a barmaid who might buy it, the others remaining outside. On entering they found the prisoner gone, the public-house having two entrances. This was on February 24. Nothing further was seen of the prisoner till March 19, when they met at the German Farm Colony in Hertfordshire, and the prosecutor said he would take 30*s.* for the ring. The prosecutor met the prisoner in a public-house on April 15, and gave him into custody, when the prisoner said he had given the ring to a man who had offered to buy it, and that the man had gone off with the ring. Up to the time of going into the public-house there was no discrepancy between the two stories. The summing-up (read) was misleading, as it did not properly distinguish between larceny as a bailee and larceny by a trick. The jury should have been told that, in order to convict of larceny by a trick, the prisoner had a felonious intent at the time he received the ring. The learned judge had insisted that the prosecutor had "been kept out of his money," and the jury may well have thought that the fact that he had not accounted for the proceeds of the ring justified them in finding him guilty. The direction was such as to constitute a substantial "miscarriage of justice."

The Lord Chief Justice: What answer was there to larceny by a bailee?

Kershaw: The jury were entitled to know which was the case against appellant.

R. V. Wynne, for the Crown: I opened the case to the jury as one of larceny by a bailee.

The Lord Chief Justice: Leave to appeal was unnecessary, this being a point of law. One has to be very careful in dealing with a case of alleged misdirection to appreciate the lines on which a case is conducted, as omission to direct the jury on a point which was not taken at the trial may not matter if no injustice is done: as in the egg-stealing case, *Stride, &c.* (1908, 1 K. B. 617; 24 T. L. R. 243; C. C. R.). Here there was no doubt the case was one of larceny by a bailee. If the case had been originally framed as one of larceny by trick, then it might be true that the direction should have been fuller, but, in the opinion of the Court, the facts here were sufficiently explained. But even assuming

1908
22 *May.*
Peter Meyer.

there had been insufficient direction the Court is clearly of opinion that the case comes within sect. 4 (1) of the Criminal Appeal Act. That enables the Court to go behind technical slips and do substantial justice. Probably one test is that the facts proved should be consistent with innocence and not consistent only with guilt. Now it could not be said here that the facts were consistent with innocence. The prisoner had kept the ring or the money, and had not communicated to the prosecutor the fact that he alleged the ring had been stolen from him. Therefore, even if the Court had thought there had been misdirection, they would not have interfered.

Appeal dismissed.

Henry Weaver.

HENRY WEAVER.

Appeal against sentence.

Marshall Hall, K.C., and *Symmons*, for the appellant (who had been granted leave to appeal and to be present), who pleaded guilty, on May 1, at the Central Criminal Court, to an indictment under sect. 1 of 1 Edw. 7, c. 10, for misappropriating 429*l.*, having been reported by the bankruptcy officials for prosecution in four cases, and was sentenced to three years' penal servitude by the Common Serjeant. This was an appeal *ad misericordiam*, and besides urging several topics, *e.g.*, appellant's previous good character, his great temptation owing to domestic misfortunes, and his readiness to make reparation, counsel insisted strongly that the Court below had allowed itself to be influenced by prosecuting counsel's statement that there were other misappropriations, amounting to 1,200*l.*, which were not charged. There might be that amount of indebtedness, but there was no evidence of fraud as to that. Counsel read extracts from appellant's public examination. He tendered a letter received the day before from the persons defrauded, who joined in the appeal for mercy.

The Lord Chief Justice said the Court could not entertain such a matter.

Symmons asked to be heard also, but the Lord Chief Justice, without saying what the practice would be where the appeal was on a point of law, said the Court would not hear a second counsel on a question of fact. *Symmons*, however, was allowed to state

that he never intended to admit below any other fraud than those pleaded to.

1908
22 *May.*
Henry Weaver.

Muir, for the Crown, was not called on.

The Lord Chief Justice regretted that the Court had been used for a purpose for which it was not intended. There was not one word in the notice of appeal, which was drawn by an intelligent man, who understood what he was being charged with, to justify the argument which has been just addressed to the Court. The long established practice could not be altered, except by the Legislature. In considering sentences it has been the invariable practice to inquire into the prisoner's history, in his own interest, and if in the course of that inquiry facts come out which damage him, the judge ought to take notice of it. The Court accepts the statement of counsel that he never admitted that there had been other frauds, but when statements are made in presence of the prisoner and his counsel, and the facts are brought before the Court on affidavit, the Court will not allow it to be said they are incorrect, unless some serious mistake is alleged. The fact that appellant had misappropriated other people's money, though intending to repay it, could be taken into account. In the opinion of the Court, the Common Serjeant had only considered the sums actually charged, and had passed a very lenient sentence —lighter than many passed by members of this Court and other judges in similar cases—though the Court would not use its power of increasing the sentence.

Appeal dismissed.

On a question arising as to the date the sentence was to run from, appellant not having been on bail, the Court ordered it to run from that day (May 22).

A. E. DYSON.

A. E. Dyson

Misdirection - Manslaughter charged after previous convictions under the Prevention of Cruelty to Children Act, 1904 (4 *Edw.* 7, *c.* 15, *s.* 1 (3))— *Accelerating Death—Lapse of a year and a day.*

There was a preliminary application by way of appeal from the refusal of Channell J. to allow appellant to be present. The Court stated that, had the only point been misdirection, it would not have interfered with that refusal; but, in the circumstances, they allowed him to be present.

Cremlyn, for the appellant (under sect. 15 (5) of the Criminal

1908
22 *May*.
A. E. Dyson.

Appeal Act), who had been convicted before Mr. Justice Coleridge at Manchester Assizes, on April 27, of the manslaughter of his child, and sentenced to ten years' penal servitude, read the summing-up.

Shepherd Little, for the Crown.

The facts and points of law which, the Court said, made the case one of great difficulty, sufficiently appear from the judgment.

Appellant was remanded to Brixton Prison.

C. a. v.

May 25.—(The indictment, on the absence of which the Court had commented, was now forthcoming.)

The Lord Chief Justice: This case has caused the Court anxious consideration. Appellant had inflicted injuries on the child in November, 1906, and December, 1907, and had suffered imprisonment for both offences. This was an ordinary indictment for manslaughter on March 5, 1908. The misdirection complained of was that Coleridge J. had directed the jury that they might find prisoner guilty if the death was caused by the injuries of November, 1906, though the full effect of those injuries was not seen till later. There were no qualifying words in these passages in the summing-up, or they would have given effect to them. It was admitted by counsel for the Crown that this direction was wrong. The cruelty was so clearly established that a somewhat recondite rule of law had been overlooked, viz., that unless deceased dies within a year and a day of the injury a charge of manslaughter cannot be maintained. That rule was stated by Coke, 3 *Institutes*, 47, 53; by Hawkins, 1 *Pleas of the Crown*, c. 31, s. 9; by East, 1 *Pleas of the Crown*, c. 5, s. 112, pp. 343, 344, and was still the law of England: 3 *Russell on Crimes* (6th ed.), p. 34, where the authorities are collected. What, then, ought the Court to do? If he had not been already convicted of the assaults, he might have been convicted under sect. 1 (3) of the Prevention of Cruelty to Children Act, 1904, so that, as it was, this Court could not proceed under sect. 5 (2) of the Criminal Appeal Act. At the same time, *Morris*, L. R. 1 C. C. R. 90; 36 L. J. M. C. 84 (1867), is a clear authority that these two convictions are no bar to an indictment for manslaughter. Can the Court, then, act under the proviso in sect. 4 (1) of the Act that they should dismiss the appeal if there was "no substantial miscarriage of justice"? After most careful thought they had come to the conclusion

1908
25 *May.*
A. E. Dyson.

that they could not. For what question should have been left to the jury? Whether appellant accelerated the death by his injury of December, 1907. With a proper direction, as in *Martin*, 5 C. & P. 128 (1832), deceased's condition having been deteriorated by previous ill-treatment, the jury might and probably would have found appellant guilty of accelerating the death, and he quite accepted the statement of counsel for the Crown that he did so put the case to them. But the reason that they could not use that power was—and it was so very important that it must be stated clearly—that the Court ought not to substitute itself for the jury. It was much to be regretted that Parliament had not given the Court power to order a new trial: such a power might only be wanted in a few instances, but this is one of them. Here, as they could not substitute themselves for the jury, they could not positively say that there would be no miscarriage of justice; they could not say that the jury *must* have come to the conclusion that the death was accelerated by the previous assault—probably they would have done so, but there was some evidence—not, indeed, the bulk of the evidence—that death may have been due to a fall: and there was no sign of external injury, and therefore it was not absolutely certain that the death had been accelerated as suggested. It was too serious in such a case to say that the jury must have come to a verdict of guilty. In *Makin* v. *A.-G. for New South Wales*, 1894, A. C. at 70, Lord Herschell, C., said:—"Their Lordships do not think it can properly be said that there has been no substantial wrong or miscarriage of justice, where on a point material to the guilt or innocence of the accused the jury have, notwithstanding objection, been invited by the judge to consider in arriving at their verdict matters which ought not to have been submitted to them." If for "invited . . . . matters" be read the words "have been told by the judge they might find a verdict of guilty on matters which ought not to have been submitted to them," the cases are very similar.

Conviction quashed.

HENRY ELLIOTT.

Henry Elliott.

More than one felony charged in indictment—One count withdrawn—Appeal against restitution order—24 & 25 Vict. c. 96, s. 100—Criminal Appeal Rule 9—Remedy for an improper order.

B. Watson, for appellant, who had been convicted on May 1 of larceny before the Chairman of the North London Sessions, and

1908
25 *May.*
Henry Elliott.

sentenced to four years' penal servitude. The first count charged feloniously breaking and entering a shop and stealing therein; the second, receiving the property on the same occasion; the third, receiving Bank of England notes, "which said notes were the proceeds" of the theft. At the trial the prosecution withdrew the third count. But counsel contended that count made the whole indictment bad: he cited *Castro*, 6 App. C. 229 (1881).

The Lord Chief Justice: Since *Heywood*, *L. & C.* 451; 33 *L. J. M. C.* 133; 9 *Cox C. C.* 479 (1864), it had always been held, that where more than one felony was charged in an indictment the judge would quash it if he thought prisoner was embarrassed thereby, or put the prosecutor to his election. Here the judge had, in effect, done the latter.

Appeal dismissed.

Merlin applied "under sect. 6 (2) of the Criminal Appeal Act" that a restitution order made at the trial (nominally against the police, but in effect) against his client (who had *bonâ fide* bought some of the stolen property from the convicted receiver) under sect. 100 of the Larceny Act, should be varied. He referred to Rule 9 (Crim. Ap. Rules).

C. L. Attenborough, for the private prosecutor and the Crown, objected that no such application lay to the Court: he suggested, in reply to the Court, that if such an order was improperly made, there was a remedy by *certiorari*.

Ridley J.: No section enables an appeal against this order.

The Court upheld the objection.

The Lord Chief Justice: Sect. 6 (2) is an enabling section, giving the Court power to vary, &c. a restitution order, but not enabling anyone to appeal against such an order. Here they were not making or varying any order, and therefore Rule 9 does not apply. That rule was meant to enable persons who wanted the order to stand, to appear when it was proposed to vary or annul it. They could only get the suggested jurisdiction by legislation. The Act did not touch previously existing remedies against a wrong order.

BEFORE THE

LORD CHIEF JUSTICE, Mr. JUSTICE DARLING, AND Mr. JUSTICE PICKFORD.

ERNEST SNELL.

Application for leave to appeal against sentence.

1908
4 *June.*
Ernest Snell.

The appellant, who was present, had made application to the single judge (Ridley J.) for leave to appeal, who referred his application to the full Court for consideration. The appellant was heard.

Application refused.

BEFORE THE

LORD CHIEF JUSTICE, Mr. JUSTICE DARLING, AND Mr. JUSTICE PHILLIMORE.

HAROLD HARTLEIGH.

Harold Hartleigh.

Fresh evidence—Jury agreeing after a disagreement.

Appellant, in person, appealed from the order of the judge (Ridley J.) refusing him (a) leave to appeal, (b) legal aid. In the event of leave being granted he asked leave to call fresh evidence.

He had been sentenced by the Chairman of the Middlesex Sessions on the 9th May, 1908, for larceny, to five years' penal servitude and three years' police supervision.

He now handed in some papers (which the Court read), and stated that the Chairman summed up to the jury against the weight of evidence; and that, after considering their verdict for some time, the jury were unable to agree, and the Chairman recalled a witness and then, on being informed that they would be locked up for two hours, they eventually agreed; and that he thought that a witness, whom he now desired to call, might be useful to him, although he had not called him at the trial (although he was present) as he thought he could do without him.

The Court thought that, especially in view of the appellant's record, there was no sufficient ground for admitting fresh evidence. As to the suggestion that the jury was coerced into agreeing, the procedure was regular, and there was no reason for interfering.

Application refused.

1908
4 *June.*
William Greenaway.

WILLIAM GREENAWAY.

Full offence or attempt?—14 & 15 Vict. c. 100 s. 9.

Appellant, in person, applied for leave to appeal from the order of Ridley J. refusing him (a) leave to appeal, (b) legal aid.

He was sentenced by the Chairman of the Middlesex Sessions, on the 9th May, 1908, for larceny, to seven years' penal servitude and to three years' police supervision.

Appellant said his defence was an alibi, and that the sentence was too severe.

R. J. Wynne (*J. P. Oliver* with him), for the Crown, stated that the prisoner was charged on two indictments—one for larceny of ten shillings, and the other for attempted larceny thereof "by ringing the changes." He thought that there might be a question whether appellant was guilty of the full offence or of the attempt only, under sect. 9 of 14 & 15 Vict. c. 100. The attempt was admitted.

The Lord Chief Justice said there appeared to be a substantial point to be considered.

Application and legal aid granted.

The hearing of the final appeal, which was in the day's list, was adjourned.

Charles Allen.

CHARLES ALLEN.

Application for leave to appeal—Verdict against the weight of evidence—Amendment of notice—Sect. 1 (f) of the Criminal Evidence Act, 1898.

This was an appeal against the refusal of Ridley J. to allow an appeal on the ground that the verdict was against the weight of evidence.

Appellant, who was not present, was sentenced by the Deputy-Chairman of the Middlesex Sessions, on the 9th May, 1908, to six months' hard labour for assaulting the police.

Hohler, K. C. (with him *C. M. Pitman*), stated the facts.

During the progress of horse races the police pursued and captured a man whom they suspected of having stolen money from the till of a refreshment booth situated near the race-course, and swore that while they had the man in custody the prisoner tried to get him away by striking the constables. The defence was that the prisoner was at the time of the occurrence at another part

1908
4 *June.*
Charles Allen.

of the course (about twenty yards distant) making bets, and that the police had made a mistake. There was an independent witness, who swore appellant "was not the man." (The Court, after discussion, thought this might mean he was not the man who committed the theft.)

[The Lord Chief Justice: There was clear evidence on both sides. On what grounds do you ask us to say the jury was wrong?]

Because one witness said positively appellant did not strike the blow; and when the foreman proposed to ask him who could identify the striker, the Deputy-Chairman advised him not to put the question.

He also applied (if necessary, for an extension of time for appeal, and) to amend the notice of application for leave to appeal so as to include the point of law that the question put to appellant in cross-examination whether he had not been excluded from another race-course was inadmissible under sect. 1 (f) of the Criminal Evidence Act, 1898; but it appeared that counsel defending at the trial had stated that there was no point of law for appeal, and the Lord Chief Justice further cited sect. 4 (1) of the Criminal Appeal Act to show that this point, even if good, would not avail if there was "no substantial miscarriage of justice."

The Lord Chief Justice said that in this case there was evidence on both sides, and it was quite impossible to say that the verdict was one which a jury might not reasonably find.

Application refused.

Hohler applied that the sentence might run from the date of conviction, and stated that appellant had been in prison since then. This application would have been made earlier, but the judge's notes could not be obtained.

Application refused.

Charles Frank Guenther.

CHARLES FRANK GUENTHER.

Leave to be present at preliminary proceedings.

Appellant, in person, appealed from an order of Ridley J. refusing him (a) leave to appeal; (b) legal aid; (c) permission to be present at preliminary proceedings. He also applied to call fresh

1908
4 *June.*
Charles Frank Guenther.

evidence and for bail. He had previously received permission to be present. He was sentenced by the Deputy-Chairman of the North London Sessions on May 13 to nine months' hard labour, and then to be deported, for larceny.

The Lord Chief Justice said that the Court had read all appellant's papers sent in, and as no advantage to him could result from re-opening the case, all his applications would be refused.

Applications refused.

Robert Williams.

ROBERT WILLIAMS.

Appellant had previously made an application to call further evidence on the ground that a question which ought to have been put to one of his witnesses by his counsel had been missed.

Application refused.

He now, by leave of Ridley J., appealed in person against a sentence of twenty-one months' hard labour passed upon him by the Deputy-Recorder of the Quarter Sessions at Liverpool on the 1st May, 1908, for receiving.

A. R. Kennedy, for the Crown, explained that the statement to the jury of appellant's previous conviction (of which he complained) was due to his defence that his character was good.

Appellant handed in papers, which the Court read, and offered to call evidence of character.

Appeal dismissed.

An application that sentence should run from the date of conviction was refused.

Bertram Mortimer.

BERTRAM MORTIMER.

Application for further evidence—Witnesses present and not called—s. 9 (b) and (c) of the Criminal Appeal Act, 1907.

Delivery by mistake—Animus furandi—*Duty to seek owner of lost property—Misdirection.*

Ground of Increase of Sentence.

Thurborn's Case *considered and criticised.*

E. Percival Clarke, for the appellant (under sect. 15 (5) of the Criminal Appeal Act), who had been convicted on the 13th May, 1908, at the North London Sessions, of stealing a bag, and sentenced by the Chairman to fifteen months' imprisonment in

1908
4 *June.*
Bertram Mortimer.

the second division, applied for leave to call additional witnesses in order to prove certain conversations with the appellant and thus to negative any felonious intention.

The bag in question had, on the 2nd April, 1908, at about 11 a.m., been deposited by a Mr. Blackall in the cloak-room at Victoria Railway Station, and contained, among other things, letters addressed to him. In exchange he received a voucher. The next thing that was heard of the bag was that it was in the appellant's possession on April 2 at a hotel at Clapham Junction. According to his own story, he handed a voucher to a porter with directions to take luggage of his own, consisting of three separate articles, out of the cloak-room (where he had himself, about 11 a.m., deposited them), and put it in the train for conveyance to Clapham Junction; and by some mistake this bag had been handed out to the porter. He lost that train, and when he ultimately arrived at Clapham Junction he found all his luggage awaiting him, and ordered it to be sent to his hotel, not noticing that there was with it a bag not his. This he did not notice till he went to his room later. He attributed the fact that part of the contents of the bag were among his own articles to their having dropped out when the landlady changed his room.

At the trial it was proved that appellant was in the neighbourhood of Victoria Station on the following day, but did not communicate with the railway company or with Mr. Blackall, whose name and address appeared on the letters inside the bag, and that certain of the contents of the bag were ultimately found amongst his own things. On the 3rd April he was arrested upon another charge and taken to Swansea, his luggage being brought on to that town by his son, Hubert Sylvester, from Clapham Junction. On the 8th April while he was detained in custody at Swansea he had an interview with his son and a woman named Gladys Wilson, in the presence of a detective, at which it was now alleged by the appellant that he told them the bag was not his property, and directed his son to communicate with the railway company. No charge at this date had been preferred against the appellant for stealing the bag, and the son (who was tried with him for the larceny and acquitted) failed to communicate with the company. Appellant set up his instructions to his son at the trial.

It was to prove this alleged conversation that appellant desired to call these witnesses. He also desired to call two other witnesses

1908
4 *June.*

Bertram Mortimer.

to prove that he had mentioned the mistake of the cloak-room attendant publicly in a shop where he was known.

George Elliott, for the Crown. All these witnesses were present at the trial and two were called: the rest could have been called. The son, a co-prisoner, could have been called "upon his own application" by sect. 1 (a) of the Criminal Evidence Act, 1898.

The Lord Chief Justice: This is an application on which it becomes necessary to consider sect. 9 (b) and (c) of the Criminal Appeal Act of 1908, which gives the Court power to call further witnesses. This power was not meant to be exercised for supplementing or supporting the case made at the trial where the witnesses could have been called.

In regard to two of the witnesses, it was said that when under arrest appellant on the 8th April made a statement to Sylvester telling him that he had a bag which did not belong to him, and to communicate with the railway company and return it to them. This was said in the presence of Gladys Wilson, who was in court at the trial, but was not called. The Court ought not to allow witnesses to be called now in order to support a case which from its nature was obviously one which ought to have been set up at the time. The Court would have to be satisfied that there had been some mistake, and that the appellant had been misled with regard to the evidence of Wilson, before granting the application. The other witnesses might have given their evidence at the trial, and the facts they spoke to were before the jury. As to the detective, no attempt had been made to get him to the Court. The matter was too plain. This decision might have been different had there been a particle of evidence that the appellant intended to restore the property.

Application refused.

The appeal (a) against the conviction, on a point of law, (b) against sentence, with the leave of Channell J., was at once proceeded with.

Clarke stated that the point of law arose in the summing-up by the learned Chairman to the jury in that he did not explain to them the very important point of law, that they must, in order to find the prisoner guilty, find that he had a felonious intention to steal the property at the time when he first became aware that property not his own was in his possession, he knowing at that

1908
4 *June.*
Bertram Mortimer.

time that the true owner could be found. They had been told that the law was the same if possession had been obtained by a mistake as if the property had been stolen. He cited *Thurborn* (1 Den. C. C. 387 ; 18 L. J. M. C. 140 (reported as *Wood*) ; 3 Cox C. C. 277, 453 : 1849) ; *Preston* (2 Den. C. C. 353 ; 21 L. J. M. C. 41 ; 5 Cox C. C. 390 : 1851) ; *Christopher* (Bell C. C. 27 ; 28 L. J. M. C. 35 : 1858) ; *Matthews* (12 Cox C. C. 489 : 1873 ; C. C. R.) ; *Meyer* (Crim. App. Reports, above, p. 10 ; 24 T. L. R. 621).

[The Lord Chief Justice : The Court will assume that the bag was handed out by mistake, and that appellant first discovered it in his room at the hotel. In looking at cases of this kind we must consider the way in which the case has been conducted at the trial.]

I submit that he took possession at the time he saw the contents of the bag and realised who the owner of it was, and the jury should have been told that unless a felonious intent was then present in the mind of the prisoner no such intent formed thereafter would make the act larceny. Upon the evidence it is clear no such intention ever was formed.

I submit that, apart from the point of misdirection, there has been a substantial miscarriage of justice on another "ground" within sect. 4 (1) of the Criminal Appeal Act, 1908. [The Court pointed out that leave to appeal on this ground had not been granted.]

With regard to the sentence, the prisoner was at first sentenced to fifteen months' hard labour, but the judge, apparently conscious of the severity of this sentence, subsequently altered it to fifteen months in the second division.

The Lord Chief Justice : The argument in this case has largely been addressed to the question as to the direction to the jury which might have been necessary if a different defence had been set up at the trial. Had there been any evidence or any suggestion by appellant that he meant to try and find out the true owner of the bag, or that he had had no opportunity of doing so, and that he had up to a certain time intended to restore the bag, then the argument would have been very material. With regard to the case of *Thurborn*, I desire to say that if this case went the length of saying that in every indictment for larceny it was

1908
4 *June.*
Bertram Mortimer.

imperative for the judge to tell the jury that the prisoner must have the *animus furandi* at the time of his first getting physical possession, then I think it went a great deal too far.

In my judgment, the real point in this case turned upon whether there was any evidence of an intention to restore the property, having regard to the means of knowledge which the prisoner had at the time.

In *Thurborn* (Den. at 396), Parke, B., delivering the judgment of the Court, said: "The result of [the] authorities is that the rule of law on this subject seems to be that if a man finds goods that have been actually lost, or are reasonably supposed by him to have been lost, and appropriates them, with intent to take the entire dominion over them, really believing, when he takes them, that the owner cannot be found, it is not larceny; but if he takes them, with the like intent, though lost, or reasonably supposed to be lost, but reasonably believing that the owner can be found, it is larceny."

In this case, as was pointed out in the summing-up, there were letters in the bag with the name and address of the owner, and the appellant knew it had been deposited in the cloak-room at the railway station, and there is no evidence on his part of his intention to restore the bag. In considering cases of this kind the Court must always look at the way in which the case was conducted before the court of trial. The prisoner conducted his own defence, which was that he never had any intention of stealing the bag. (His Lordship read passages from the summing-up, including one which ran "if you, knowing an article is not yours, deliberately take possession of it with the intent of appropriating afterwards for yourself, then it becomes stealing.") I am unable to see that there has been any misdirection, and therefore there is no necessity to consider the proviso to sect. 4 (1).

I come now to another part of the case. The appellant was originally sentenced to fifteen months' hard labour. As I have had occasion to observe, it is the duty of the Court to inform itself of any facts for or against the prisoner. Having regard to the nature of the previous convictions, the Court can see nothing to justify the reduction of this sentence to the second division. He must be sentenced to fifteen months' hard labour.

Appeal dismissed. Sentence increased.

BEFORE THE

LORD CHIEF JUSTICE, MR. JUSTICE DARLING, AND MR. JUSTICE CHANNELL.

FRANK ROUMILLEN.

Application for leave to appeal—Further evidence to strengthen alibi unsuccessfully set up.

1908
19 *June.*
Frank Roumillen.

Sibley, for the appellant (who was present), appealed from an order of Ridley J., refusing leave to appeal against a conviction at the Liverpool Assizes on May 11, before Coleridge J., of stealing certain luggage from a cloak-room, for which he had been sentenced to twelve months' hard labour, and also applied for leave to call further witnesses. Only two witnesses had identified appellant as taking part in the theft at Liverpool, and he had called five to show that he was in London so early the next day that he could not have been concerned in the theft, and he now wished to call six more for the same purpose.

It was admitted that appellant was an acquaintance of the prisoner convicted with him, in whose company he was shown to be the day after the theft.

(Counsel not having a transcript of the shorthand notes of the trial was allowed to use the Court's copy.)

The LORD CHIEF JUSTICE said that if this was a case of two witnesses against eleven it might be right to reconsider it, but the cumulative evidence in support of the conviction was overwhelming. The alibi had been distinctly left to the jury, and they had disbelieved it.

Application refused.

Solicitor for the Appellant—Quilliam, Liverpool.

WILLIAM STANLEY VAUGHAN.

Notice of grounds of appeal—Leave to argue a point of law without notice—Misdirection—When duty of judge to suggest conviction for lesser offence—Wounding with intent to murder or unlawful wounding—Sect. 5 (2) of the Criminal Appeal Act.

William Stanley Vaughan.

The appellant was convicted at the Liverpool Assizes on May 18, for wounding with intent to murder, and was sentenced by Coleridge J. to five years' penal servitude.

Sibley, for the appellant (who was not present), appealed from an order of Ridley J. refusing him (a) leave to appeal against

1908
19 *June.*

William Stanley Vaughan.

conviction, (b) legal aid, and though no notice of appeal on a point of law had been given, obtained leave to raise the point that the judge at the trial omitted to tell the jury that it was open to them to convict him of the lesser offence of unlawful wounding.

(Counsel not having a transcript of the shorthand notes of the trial was allowed to use the Court's copy.)

In reply to the Court, he said he did not complain of anything in the summing-up. He submitted that the Court could deal with the point under sect. 5 (2) of the Criminal Appeal Act.

The Lord Chief Justice said that the point had been taken by counsel at the trial and could only be raised now as a suggested misdirection, but there was no misdirection in this case, and a judge was not bound in every case to tell the jury that they were at liberty to convict of a lesser offence, unless that point was substantially raised by the evidence.

Application refused.

Solicitor for the Appellant—Quilliam, Liverpool.

CHARLES HAWES.

Plea of guilty—Leave to appeal (not against conviction but sentence).

Charles Hawes.

Appellant, in person, applied for leave to appeal from the order of Ridley J. refusing him (a) leave to appeal against conviction, (b) legal aid. He also asked leave to call additional evidence. He had given himself up to the police, and upon his trial pleaded guilty to an indictment against him for stealing a pony and trap in 1902. He was sentenced to twenty-one months' hard labour at the South London Sessions on May 21 by the Chairman, and urged that this sentence was too heavy. Since 1902 he had served four years' penal servitude for another offence.

The Lord Chief Justice said the Court could not grant leave to appeal against the conviction as appellant had pleaded guilty, but gave him leave to appeal against sentence, and granted him legal aid. He would only be allowed to call further evidence as to character.

Applications granted.

GEORGE COLEMAN.

1908
19 *June*

George Coleman.

Application to call further evidence—Liberty to counsel to apply.

Appellant, in person, appealed against an order of Ridley J. refusing him (a) leave to appeal against his conviction, (b) legal aid. He also asked for leave to call further evidence.

The Court granted the two former applications, and as to the third, said that if appellant's counsel thought it necessary he could apply for leave.

Applications granted.

HARRY JONES.

Further evidence—Witnesses who could have been called at trial.

Harry Jones.

Forrest Fulton, for the appellant (under sect. 15 (5) of the Criminal Appeal Act), who was not present, applied for leave (a) to appeal against conviction, such an application having been referred to the full Court by Pickford J., (b) to call further evidence. An application to be present at this hearing was refused by Pickford J., but the appeal against this refusal was not proceeded with.

The appellant was convicted on May 28 at the Central Criminal Court for assault with intent to do grievous bodily harm and sentenced by Mr. Commissioner Rentoul to four years' penal servitude. His defence was that he took no part in the assault, and he had only ascertained the whereabouts of the witnesses, whom he now desired to call, since his conviction; he had stated at the trial that there were witnesses whom he desired to call. It appeared that appellant had often been convicted of assaults.

Darling J. delivered the judgment of the Court: There was ample evidence to justify the conviction. As to the witnesses, appellant could have asked to have them called at the trial.

Applications refused.

ALBERT ARNOLD.

Sentence—Penal servitude or imprisonment with hard labour?

Albert Arnold.

Hawtin, for the appellant (under sect. 15 (5) of the Criminal Appeal Act), who was not present, applied for leave to appeal

1908
19 *June.*
—
Albert Arnold.

against conviction and sentence, such an application having been referred to the full Court by Pickford J., and to call further evidence.

The appellant was convicted on the 28th May, 1908, at the Central Criminal Court for stealing cigars valued at 55*s.* and sentenced by the Recorder to three years' penal servitude.

The application as to an appeal on the facts was not pressed.

The Lord Chief Justice incidentally remarked that three years was the shortest sentence of penal servitude that could be inflicted, and this was by many persons considered a more lenient sentence than one of eighteen months' hard labour. As it appeared that the Recorder took into consideration the fact that appellant was an associate of a habitual criminal, who had pleaded guilty to this offence, it could not be said that the sentence was too severe.

Applications refused.

HELENA VAN WAAS.

Appellant's case in writing.

Helena Van Waas.

This was an application for leave to appeal from the order of Pickford J. refusing (a) leave to appeal against conviction, (b) legal aid.

Appellant, who had been convicted of selling obscene prints, but found insane, and sentenced by the Chairman on May 28 at North London Sessions to be detained "during His Majesty's pleasure," had sent in papers, which the Court read.

The Lord Chief Justice, in giving judgment, remarked that there were statements in the papers handed in by the appellant which the police should investigate.

Application refused.

SQUIRE SIDLOW.

Sentence—Principle of Revision—Sect. 14 (3) *of the Criminal Appeal Act.*

Squire Sidlow.

This was an application for leave to appeal against a sentence of four months' hard labour passed by the Deputy Recorder at the Manchester Quarter Sessions on May 27, 1908, for stealing metal, referred to the full Court by Pickford J.

H. S. Q. Henriques, for the appellant (under sect. 15 (5) of the Criminal Appeal Act), who was not present, stated the facts.

1908
19 *June.*
Squire
Sidlow.

He had been indicted, with two other men (who were acquitted), for stealing 101 lbs. of scrap metal, worth in all 17*s.* or 18*s.*, on May 11, when 35 lbs. was found in his possession. He had admitted taking this at different times, and this was the only evidence against him. The greatest value of any piece he had taken—a bit of piping—was about half-a-crown, and he had no connection whatever with either of the other prisoners. Yet there could be no doubt that the jury was influenced against him by the evidence against those two, which related to all the metal except the 35 lbs.

[CHANNELL, J.: He might have objected to be tried with them: he was defended.]

This application might have been against the conviction, as not only was the sentence harsh, but the trial unsatisfactory. The learned judge, in passing sentence, clearly had not only in view the trivial offence as to the piping but the whole 101 lbs., the subject of the indictment. It might be argued that the evidence showed a substantial variance from the indictment.

[CHANNELL, J.: If the point had been raised, the Crown could have amended by alleging the most valuable piece—the piping.]

But then the sentence should have been lighter. The learned judge ought to have bound him over. There was no previous conviction, and the jury strongly recommended him to mercy.

The LORD CHIEF JUSTICE said the question of sentence was by no means free from difficulty, but the Court would not interfere with a sentence unless it was apparent that the judge at the trial had proceeded upon wrong principles, or given undue weight to some of the facts proved in evidence. It was not possible to allow appeals because individual members of the Court might have inflicted a different sentence, more or less severe. There was, in this case, evidence of one or more substantial pieces of metal being taken by the appellant, who could not possibly have thought he had a right to take them. The judge evidently thought the offence was not an isolated act. It could not be said that he had proceeded either on a wrong view of the facts or on a wrong application of the law to the facts. Having regard to all the circumstances in this case, the sentence would run from the date of the conviction.

Application refused. Sentence to run from date of conviction.

1908
19 *June.*

Benjamin R. Noble.

BENJAMIN R. NOBLE.

This was an application for leave to appeal against sentence, which had been referred to the full Court by Pickford J.

Appellant, who was not present, was a Post Office servant, and had pleaded guilty at Winchester Assizes on May 27, 1908, to stealing two postal packets, each containing money, and was sentenced by Lawrance J. to fifteen months' hard labour.

CHANNELL J. delivered the judgment of the Court. Post Office officials necessarily had good characters, or they would otherwise not obtain their positions, and when the question of sentence was being considered, it was the recognised practice that they could not claim the benefit of their good character in the same way as that of other prisoners. Within his memory, the sentence for this kind of offence was invariably penal servitude.

Application refused.

GERALD TATE.

Sodomy—Corroboration.

Gerald Tate.

W. J. H. Brodrick, for the appellant (under sect. 15 (5) of the Criminal Appeal Act), who had been convicted of sodomy on May 29, 1908, at the Assizes held at Winchester, and sentenced by Phillimore J. to five years' penal servitude, applied for leave to appeal against conviction, the consideration of which had been referred to the full Court by Pickford J., dealt with the evidence and argued that as to both of the two theories which the learned judge left to the jury, he ought to have pointed out that there was no corroboration.

The LORD CHIEF JUSTICE said the real point of the case was whether there was sufficient corroboration of the evidence of the principal witness, who had been party to the offence.

Leave granted.

CHARLES FLUELLIN.

Further evidence to prove perjury of co-prisoner, witness against appellant.

Charles Fluellin.

W. D. Mathias, for the appellant (under sect. 15 (5) of the Criminal Appeal Act), who was not present, made application (a) for leave to appeal against conviction, such an application having been referred to the full Court by Pickford J., and (b) for leave to call further evidence. He said that the appellant was jointly

convicted with one Foster on May 27 at the Winchester Assizes for burglary. Foster pleaded "guilty," and was called for the prosecution. Appellant was sentenced by Lawrance J. to eighteen months' hard labour. His defence was an alibi, and it was now alleged that Foster's evidence against him was a concoction, and the witnesses sought to be called were to prove that Foster himself was elsewhere when he alleged the burglary was committed by him and appellant.

1908
19 *June.*
Charles Fluellin.

The Lord Chief Justice said the independent evidence against appellant was ample.

Applications refused.

WILLIAM GREENAWAY (*a*).

Attempted "ringing the changes"—When larceny complete—Combined effect of Criminal Procedure Act, 1851 (14 & 15 *Vict.* c. 100), *s.* 9, *and Criminal Appeal Act*, 1907, *s.* 5 (2).

L. G. H. Horton-Smith, for the appellant (under sect. 15 (5) of the Criminal Appeal Act), stated that he, together with two other men named Fuller and Ikeson, was watched for two or three hours on the afternoon of the 8th April, when they were seen together walking up and down certain streets in Hornsey, looking into shop windows, and, according to the suggestion of the prosecution, were there with the object of "ringing the changes." Fuller went into a tobacco shop, and, in asking for twopennyworth of tobacco, handed the owner a half-sovereign in payment. She handed him the change, amounting to 9*s.* 10*d.*, and the next moment Fuller asked her if she would oblige him by giving him a sovereign in exchange for a half-sovereign and ten shillings in small change. Whilst she was getting this sovereign Fuller picked up the half-sovereign with which he had just paid for the tobacco, and which she had left beside the till, intending to re-hand her that coin, together with the ten shillings in small change, in exchange for the sovereign, and thereby to gain at her expense ten shillings, but on her return she at once missed the original half-sovereign, and asked him where it was. Fuller returned it to her. The appellant did not enter her shop at all, but remained outside in company with Ikeson. Fuller was seen immediately after this to enter another shop close by, and there attempted a similar trick, and appellant joined him there.

William Greenaway.

At the trial the Chairman, in his direction to the jury, said that

(*a*) See p. 18, above.

1908
19 *June.*
William Greenaway.

if they were satisfied with the evidence of the shopowner that a larceny had been committed in the tobacco shop, and that if they were satisfied that the other two men were waiting outside as confederates of Fuller, with a common purpose, then they were all equally guilty of larceny. It was now submitted on behalf of appellant that the Chairman was wrong in leaving it to the jury to say whether or not there was a larceny at all; that larceny required (1) an overt act; (2) an intention to deprive the owner of property; that here Fuller never intended to deprive the owner of her property in the specific half-sovereign which, upon the evidence, it was clear he was going to hand back to her in any case, and that Fuller's real offence was that of attempting to obtain from her by a trick the *value* of ten shillings.

[DARLING, J.: When the woman's back was turned, and Fuller picked up the half-sovereign, surely he had appropriated it, whether he intended to give it back to her in ringing the change, or not?]

At the highest, it was only an *attempt* to commit a larceny. The jury ought to have been told that they could find an attempt *only* by Fuller. By virtue of the joint operation of sect. 9 of the Criminal Procedure Act, 1851, and of sect. 5 (2) of the Criminal Appeal Act, this Court could substitute such a verdict for the actual one. In any case, the sentence was excessive.

J. P. Oliver, for the Crown: The sentence was carefully considered; appellant's previous character was very bad.

The LORD CHIEF JUSTICE said that the Court had given leave to appeal in this case (*b*) because it was suggested there might be a point as to whether there was any evidence to convict Fuller of the full offence of larceny or merely of an "attempt." There was no doubt on the evidence that Fuller had been guilty of larceny of the half-sovereign when he was interrupted. There had been a proper direction to the jury, and he had been rightly convicted. So far as concerned appellant, it is clear that he was in the company of Fuller for a considerable time, and was, no doubt, a party to what was being done. There was no ground for interfering with the conviction. Appellant had been convicted upon many occasions, and the judge was right in regarding him as a dangerous criminal. The sentence must be affirmed.

Appeal dismissed.

(*b*) See p. 18, above.

BEFORE THE

LORD CHIEF JUSTICE, MR. JUSTICE RIDLEY, AND MR. JUSTICE DARLING.

1908
3 *July*.

Henry Martin.

HENRY MARTIN.

Witnesses not called at the trial—C. A. Rule 32b.

G. St. J. McDonald, for the appellant (under sect. 15 (5) of the Criminal Appeal Act), who was not present, applied for leave (a) to appeal against conviction, such an application having been referred to the full Court by Pickford J., (b) to call further evidence.

The appellant was convicted on May 30 at the Central Criminal Court for robbery with violence together with certain persons unknown, and sentenced by Mr. Commissioner Rentoul to three years' penal servitude. His defence was that at the time of the alleged robbery he was with his mother inside her own house, some fifty yards away from the scene of the robbery, and that on leaving the house he saw two men running away whom he knew, and that on walking up the street he was met by the prosecutor and two police officers, who arrested him. It appeared that whilst the appellant was under remand and awaiting trial in Brixton prison, a prisoner named Brady, also under remand for another charge at the same prison, wrote a letter to his wife saying that the appellant was innocent. Brady was convicted at the same Court, but was not called to give evidence on the trial of the appellant. Leave was asked to call him and others, and the Court was asked to put in force Rule 32b, so that the letter might be produced.

THE LORD CHIEF JUSTICE: The Court will grant leave to appeal and to call the witness Brady only. Permission to call fresh witnesses is not given unless some reason is given why they were not called at the trial. No order is made as to the letter, but it had better be in Court, although it is at present doubtful if it could be used as evidence.

Applications granted.

1908
3 *July.*
William Hemming.

WILLIAM HEMMING.

Forgery—Comparison of handwritings.

The appellant was convicted on June 1 at the Central Criminal Court for forging and uttering a request for the payment of money, and was sentenced by Mr. Commissioner Rentoul to eighteen months' hard labour.

G. M. Gathorne-Hardy, for the appellant (under sect. 15 (5) of the Criminal Appeal Act), who was not present, applied for leave (a) to appeal against conviction, such an application having been referred to the full Court by Pickford J., (b) to call further evidence. His defence was that he was the innocent "catspaw" of a man named Ellis, and that the forged letter containing the request for the payment of the money was not in his handwriting, but was written by Ellis, who had since died. He desired leave to call two men to show that the letter was handed to him by Ellis.

The Lord Chief Justice said leave could not be given; there appeared to be some evidence, from the comparison of handwriting, that the letter was written by the appellant, and the Court could not overlook the fact that the appellant knew the contents of the letter.

Applications refused.

Arthur Towler.

ARTHUR TOWLER.

Question of identity—Sufficiency of evidence for jury.

The appellant was convicted at the Norfolk County Assizes on June 6 for killing a lamb, with intent to steal part of it, and was sentenced by Walton J. to six months' hard labour.

S. P. Low, for the appellant (under sect. 15 (5) of the Criminal Appeal Act), who was not present, applied for leave to appeal against conviction. Such an application had been referred to the full Court by Pickford J. The question was purely one of identity.

It was admitted that, when arrested, the appellant had a quantity of blood on his boots and lamb's wool on his clothes,

and his footprints corresponded with those at the spot. His defence was an alibi, and that it was a case of mistaken identity.

1908
3 *July.*
Arthur Towler.

The LORD CHIEF JUSTICE said the Court could not possibly override the verdict of the jury in a case like this; the case was properly put before the jury by the judge. In view of the appellant's admissions, it is impossible to say there was not evidence upon which the jury might properly convict.

Application refused.

PATRICK O'SULLIVAN.

Patrick O'Sullivan.

Duty of finder of property—Evidence of theft to convict receiver—Meyer (*above, p.* 10) *affirmed.*

Finding of jury not necessarily a "verdict."

Previous good character not a ground for allowing sentence to run from conviction.

Curtis Bennett, for the appellant (under sect. 15 (5) of the Criminal Appeal Act), who was not present, applied for leave (a) to appeal against conviction, such an application having been referred to the full Court by Pickford J., (b) to call further evidence.

The appellant was convicted on May 12 at the North London Sessions for receiving two diamond rings, and sentenced by the Deputy-Chairman to six months' imprisonment in the second division. The rings had been sent early in March by registered packet to a firm of diamond merchants in Hatton Garden. On March 4th this packet, together with several others, was handed to a postman for delivery at various addresses in the district. At one address he had some packets to deliver, and these were at the bottom of his bag, and so, to reach these, he took out the others, which were on top, and placed them on the counter, and, having delivered the former, he replaced the remainder in his bag, and went to the address of the packet in question. He then discovered that the registered packet containing the two rings was missing. On April 21 the appellant pawned one of the rings, and pawned the other on April 24. He was arrested on April 28 by a police officer, to whom he had complained of having been robbed

1908
3 July.
Patrick O'Sullivan.

of one of the pawn-tickets by a man in a public-house. He said first that he had found the two rings inside an old cigarette case outside the Patent Office, and then that he had bought them from some one outside that building.

In his summing-up, the Deputy-Chairman left it to the jury to say whether the appellant found the rings, and if he did, directed them that it was his duty to take them to the nearest police-station. Counsel submitted that there was no such duty. The jury first returned a verdict of "misappropriating after finding, but the jury would like to know whether there was any name on the cigarette case."

[DARLING, J.: That is not a verdict.]

There was no evidence for such a finding, and if prisoner had been defended counsel would have claimed it as not guilty. After that the Deputy-Chairman asked the jury: "Has he given you a proper explanation of his having the rings"? and they said: "No, we find him guilty of receiving." It was now submitted that there was a misdirection, and that there was no evidence of the property having been stolen. There must be some evidence of theft.

[DARLING, J.: There was conclusive evidence that some one stole it.]

The LORD CHIEF JUSTICE said that, assuming counsel for the appellant to be right on some technical point, how could the appellant justify his possession of the rings and the different accounts he had given? Could it be said that the facts here are consistent with his innocence and not consistent with his guilt? This Court had to consider a similar question in the case of *Meyer* (Criminal Appeal Reports, above, p. 10), where that test was applied.

Application refused.

An application that, in view of appellant's previous good character, sentence should run from the date of conviction was also refused.

CHARLES HORSFALL AND JOSEPH JONES.

1908
3 *July.*
Charles Horsfall and Joseph Jones.

Admission by co-prisoner of previous convictions—Effect on jury.

F. K. North, for the appellants (under sect. 15 (5) of the Criminal Appeal Act), who were not present, applied for leave to appeal against their conviction, on the ground of insufficiency of evidence of identification, such an application having been referred to the full Court by Pickford J.

The appellants were convicted on June 5, at the Norwich Assizes, and sentenced by Mr. Commissioner Low, K.C., Horsfall to eighteen months' hard labour and Jones to twelve months', for larceny of money from a public-house counter. Horsfall confessed to taking the money when the proprietor's back was turned, and at the same time implicated Jones, whose defence was an alibi. He had also informed the jury of his many previous convictions, and this, despite a most favourable summing-up, had influenced them against Jones.

[The Lord Chief Justice: If a prisoner chooses to talk about his convictions, it cannot be said that the jury may not take them into consideration.]

At the trial evidence was given by a man that he saw Horsfall leave the public-house and speak to Jones, who was outside, and then saw both go off together, but he failed to identify Jones at the police station. The appellants lodged together at the same house, and their landlady proved at the trial they were both away from their home at the time the deed was committed. Fourteen previous convictions were proved against Horsfall and three against Jones. There was practically no identification of Jones.

Application refused.

JOHN FREDERICK SPENCER.

John Frederick Spencer.

Sentence of twelve years' penal servitude on first conviction.

Appellant, who was not present, had made an application in writing for leave to appeal against sentence, which was referred by Pickford J. to the full Court. The facts sufficiently appear from the judgment.

1908
3 *July.*
John Frederick Spencer.

The LORD CHIEF JUSTICE said the case was a most remarkable one. The appellant, who was of a religious turn of mind, and of good character, and possessed of ample means to enable him to lead an honest life, had pleaded guilty to one burglary and been convicted of two others at the Borough Sessions at Leicester, and sentenced on June 12 by the Recorder to twelve years' penal servitude in all. This was his first conviction, and the sentence was undoubtedly severe, but not too severe, having regard to the extraordinary facts which were proved at the trial. When arrested he was found fully equipped for committing burglaries, and the marks on one jemmy in his possession corresponded with the marks in fifteen houses which had been entered in the neighbourhood, which had been terrorised. Ninety men in plain clothes had had to patrol the district.

Application refused.

Thomas McGuire.

THOMAS McGUIRE.

Attempted burglary—Police supervision.

S. R. Crawford, for the appellant (under sect. 15 (5) of the Criminal Appeal Act), who was not present, applied for leave to appeal against conviction, such an application being referred by Pickford J. to the full Court.

Appellant was indicted with another man on the 16th June at the North London Sessions for burglary at a shop, and was found guilty of aiding and abetting, and sentenced by the Deputy-Chairman to four years' penal servitude, to be followed by three years' police supervision. The principal was sentenced to nine months' hard labour. A police officer, who arrested them, said he saw the men in the doorway of the shop. He watched them for some time, when they tried to force the entrance door.

The appellant's defence was that he was going home with the other prisoner, who was drunk, when they fell inside the doorway of the shop, and that the whole incident was a drunken escapade, and that there was no evidence of attempted burglary or of any felonious intent. It was also submitted that the sentence was too severe.

DARLING J., who delivered the judgment of the Court, said the

verdict of the jury could not be interfered with. The appellant had been several times convicted, and it was obvious he was a person who required police supervision.

1908
3 *July.*
Thomas McGuire.

Application refused.

GERALD TATE (*a*).

Gerald Tate.

How far prosecutor in sodomy an accomplice—Nature of corroboration of such an accomplice—Corroboration generally.

How far non-denial of the formal "charge" *corroboration*—Cramp (5 *Q. B. D.* 307) *distinguished.*

W. J. H. Brodrick, for the appellant (under sect. 15 (5) of the Criminal Appeal Act), who was present, stated the facts.

Prosecutor was a boy, aged 16 years, and the indictment alleged an offence on November 20, 1907. To this prosecutor swore, adding that on that date he was innocent and healthy, but on January 11, 1908, he was operated upon for a loathsome disease, which he first noticed a month after November 20.

At the trial two doctors stated that this growth was gonorrhœal in character and was at least three months old; one of them thought it was older. They agreed that it was due to such infection and could in its turn produce it. It was admitted appellant was suffering in this way on November 26, and told a lie on that day as to how this had come about. The medical evidence, therefore, only showed that appellant's condition on November 26 may have been due to contact with the boy, who was then suffering, but this evidence was consistent with appellant having contracted the disease elsewhere.

There were two possible theories and the learned judge did not distinguish between them. (1) The prosecutor's story that he was innocent and healthy on November 20th, and that the offence was committed on that day. This alleged innocence was wholly inconsistent with the medical evidence. Although if prosecutor was innocent he did not in law require corroboration, still not only was there oath against oath, but the whole weight of evidence was against the prosecutor's story. (2) If the medical theory was correct, the prosecutor on November 20 was suffering from a

(*a*) See p. 30 above.

1908
3 *July.*
Gerald Tate.

loathsome disease and was, therefore, of bad character. In that case corroboration was necessary, and there was none. The observed facts on November 26 were no corroboration because they were inconsistent with prosecutor's evidence, and the Crown are not entitled to pick out from his evidence what helps their theory and ignore the rest. On these grounds counsel objected to the direction of the learned judge in summing up, "Are you going to believe the prosecutor or the prisoner? Your verdict depends on which you believe." If the judge thought there was any doubt as to whether prosecutor consented or to what extent, then he ought to have given the jury the usual caution as to corroboration of accomplices.

W. H. Nash, for the Crown, admitted that the prosecutor must be considered an accomplice, but submitted there was no rule of law absolutely requiring corroboration. He cited the judgment of Cave J. *In re Meunier*, (1894) 2 Q. B. at p. 418, and the cases of *Stubbs* (1855), 25 L. J. M. C. 16, and *Boyes* (1861), 1 B. & S. 311.

[Ridley J. referred to the summing up of Abbott, C.J. in *Thistlewood* (1820), 33 St. Tr. 921. If corroboration was necessary, it was to be found in the medical evidence, which showed that prosecutor and appellant were suffering from the same thing simultaneously.]

[Lord Chief Justice: There is no doubt that corroboration may be found in statements made by the person accused.]

[Darling J.: The judge must tell the jury what he means by corroboration. Suppose the only evidence against a prisoner on a charge of burglary is that of an accomplice, would it be corroboration if the prisoner was shown to have told a lie on an immaterial point? Is there corroboration here worth taking into account?]

Again, no reply was made by the appellant to the policeman when arrested.

Counsel cited *Cramp* (1880), 5 Q. B. D. 307; 14 Cox C. C. 390, but the Lord Chief Justice distinguished that case from this.

[Darling J.: When a person is charged at a police station, and is given the usual caution in the usual formula, "What you

1908
3 *July.*
Gerald Tate.

say will be taken down, &c.," and he does not say anything, is that corroboration ?]

No, as he is not required to say anything at all.

[Darling J. : Neither was the appellant obliged to say anything to the policeman.]

Brodrick, in reply. In cases of this kind you should be able to rely upon the evidence of the chief witness, but here you cannot do anything of the kind. The medical evidence as to prisoner's condition on November 26 does not strengthen the prosecutor's evidence, but contradicts it.

The Lord Chief Justice, in delivering the judgment of the Court, said they had had very great difficulty in arriving at a decision. These are offences which require to be clearly proved, and the evidence must be carefully scrutinised. There is no absolute rule of law that an accomplice must be corroborated, but it is important that juries should be cautioned.

In such an offence a party consenting is equally guilty, and therefore the boy was, on one theory, in the position of an accomplice.

The correct rule as to directing juries is laid down by Taylor (Evidence, sect. 967, 10th ed.): "Judges, however, in their discretion, generally advise a jury not to convict a prisoner upon the testimony of an accomplice alone." Judges therefore have a discretion, and should advise a jury not to convict a man, except in very special circumstances, on uncorroborated testimony. See also 3 Russell on Crimes, 6th ed., p. 645. The jury received no caution in this case; on the contrary, the jury were asked, "Which of the two are you going to believe?" It would have been better if it had been pointed out to the jury that it was not safe to convict.

The Court would not have acted upon this view if there was substantial corroboration, looking at the whole of the facts in this case. The evidence of the boy was contradicted in many material particulars.

The condition of the boy on the 11th January was certainly consistent with his having had the disease for at least three to four months previously, and in connection with this is the fact that he said he had no disease about him before.

There must be a material corroboration in a material part of the

1908
3 *July.*
Gerald Tate.

story. In ordinary circumstances communication of disease may well be corroboration and is constantly so treated but here the fact of disease was not consistent with the rest of the prosecutor's story, and he was discredited.

A case of this sort should be clearly established, especially where there is any suspicion cast upon the evidence of the prosecutor.

The non-denial to the policeman when charged was no corroboration, although the absence of denial may in some cases be corroboration, as Denman J. held it was in *Cramp* (above), where a father accused the prisoner of giving his daughter things to procure abortion and prisoner did not deny it—a totally different state of things to that here.

Conviction quashed.

Charles Hawes.

CHARLES HAWES (*a*).

Cumulative sentences—Sentence for offence tried after but committed before a previous conviction.

Jelf, for the appellant (under sect. 15 (5) of the Criminal Appeal Act), who was present, stated the facts (*a*). Since 1902 he had served a term of fifteen months' hard labour, and another of four years and nine months' penal servitude for other offences. It was now submitted that had the judge who sentenced him to penal servitude been informed of this offence at the time he would no doubt have taken it into account, but would certainly not have sentenced appellant to an extra twenty-one months' imprisonment.

C. Weller Kent, for the Crown, mentioned circumstances of aggravation of the crime; appellant was an old offender.

The Lord Chief Justice said as a rule the Court did not interfere with a sentence, but in this case the circumstances were somewhat different. The sentence was severe, and if any one of them had been dealing with it at the same time as the other offence he would not have added to the term of four years as much as twenty-one months. The sentence should be reduced to twelve months' hard labour, to run from the date of conviction.

Sentence reduced.

(*a*) See p. 26, above, where for "pleaded guilty" *read* "was found guilty."

ROBERT GATHERCOLE.

1908
3 *July.*
Robert Gathercole.

Evidence by police after verdict—Good character as a ground for mitigation of sentence.

Rowsell, for the appellant, who was present, appealed against sentence by leave of Pickford J.

Appellant was convicted, together with a man named Beck, at the Central Criminal Court on the 23rd June for conspiracy to defraud, and by false pretences causing the execution of a tenancy agreement, and sentenced by the Recorder to twenty months' hard labour. It was suggested that the Recorder had been influenced by the evidence that appellant had been previously charged (and discharged) for masquerading in the streets as a woman. It appeared that it was suggested after verdict that appellant had been guilty of two other similar offences, and counsel complained that the evidence of the police after verdict was too loose.

The Lord Chief Justice objected to counsel's reflection on the police, who, in the opinion of the Court, were as a general rule fair in their evidence after verdicts. The Court was now asked that, because a man had once a good character, he should have a lighter sentence than a man with a bad one. The Court could not agree to this, and saw no grounds at all for interfering with the sentence.

Appeal dismissed.

Pierron & Ellis—Solicitors for the Appellant.

BEFORE THE

LORD CHIEF JUSTICE, MR. JUSTICE DARLING AND MR. JUSTICE CHANNELL.

JOHN OLIVER.

1908
10 *July*.
John Oliver.

Summary list—Sect. 15 (2) *of the Criminal Appeal Act.*

The Registrar had referred the notice of appeal to the Court on the ground that it did not "show any substantial ground of appeal." The Court approved this view.

Application summarily dismissed.

JOSEPH ATKINS.

Joseph Atkins.

Sect. 5 (4) *of the Criminal Appeal Act—Insanity or mental deficiency not suggested at the trial—Practice of the Court—Assignment of Solicitor—Subpœna of witnesses, on responsibility of Counsel, to prove insanity.*

Ronald Walker, for the appellant (under sect. 10 of the Criminal Appeal Act), who was not present, applied, by leave of Channell J., for leave to appeal against sentence, and also asked to be allowed to call further evidence. Appellant had pleaded guilty to an indictment under sect. 4 of the Criminal Law Amendment Act, 1885, at Herts Assizes on June 22, and had been sentenced by Jelf J. to fifteen years' penal servitude. Prisoner was undefended, and counsel submitted that the crime was so terrible, the victim having been his own daughter, seven years old, that he must have been deprived of his reason, and, in fact, there was evidence—which was not before the judge—to show that he was a man, if sane, yet "of inferior stock," and that two or three members of his family were insane. Such evidence would clearly have affected the sentence.

[The LORD CHIEF JUSTICE: Have you any affidavit or other evidence as to the state of the appellant's mind?

1908
10 *July.*
Joseph Atkins.

CHANNELL J.: His own statement was, "I believe I am insane," and on this ground I allowed solicitor as well as counsel, so that the question might be properly looked into; there ought, therefore, to be formal proof.]

Counsel stated that he had the proofs of two witnesses, viz., appellant's wife and the doctor at St. Alban's prison.

The LORD CHIEF JUSTICE: In this case the point now raised was not taken at the trial, the prisoner had been in custody since his arrest, and the prison doctor could have been called.

Counsel said enquiries had been made of the doctor, and his statement (read) was to the effect that though he was not insane and not irresponsible, the appellant had suffered from sunstroke and alcoholism, and was physically and mentally deficient. He submitted that this was enough to show weakness. The police said that at the time of the offence he showed no signs of drink. There were seven other children. Counsel was permitted to read the proofs of three witnesses.

The LORD CHIEF JUSTICE said the Court expressed no opinion whatever as to the severity of the sentence, which, indeed, might have been one for life. But leave would be granted as the condition of appellant's mind had been raised here, and not at the trial. On the hearing of the appeal, the Court would consider how far the fact that the point was not raised at the trial affected the question. The Court entirely approved of a solicitor as well as counsel being assigned in such a case. But on such an application, when there was no evidence of insanity at the trial, there ought ordinarily to be proof on affidavit before the Court, and not merely a statement; that was the object of investigation by a solicitor. Counsel must, if they think it necessary, on their own responsibility, subpœna witnesses to be present. As to the particular persons to be called, application in this instance may be made to the single judge, so that the expenses of fresh witnesses sanctioned by him could be paid. Any such witnesses would be examined in Court.

Applications granted.

EDWARD HEWSON.

1908
10 *July.*
Edward Hewson.

Unnecessary admission of previous conviction a ground of appeal—When it is necessary to take proofs of fresh witnesses the Court will assign a solicitor.

Disney, for the appellant (under sect. 10 of the Criminal Appeal Act), who was not present, had obtained leave to appeal against his conviction, but applied for leave to call two fresh witnesses. He had been convicted on June 23 at Lincoln Assizes of burglary, and had been sentenced by Bray J. to three years' penal servitude. There was no direct evidence to connect appellant with the burglary, but one witness at the trial identified him as having pawned a suit of clothes stolen in the burglary the next morning at Cleethorpes. The prisoner, who was undefended, had volunteered to tell the jury that he had often been convicted before. The two persons in question could prove that at the time of the pawning appellant could not have been at Cleethorpes. At the trial he produced letters from these two persons which, if true, proved the alibi, but, of course, they were not evidence.

[CHANNELL J.: On that ground I gave leave to appeal. It was beyond my province to say that the Court would hear the witnesses.]

The Court granted leave to call the two persons, and, on the application of counsel, allowed a solicitor so that their proofs might be taken.

Application granted. Solicitor assigned.

RACHEL BATES.

Rachel Bates.

Severity of sentence affected by allegations of indictment not proceeded with.

Lawless, for the appellant (under sect. 15 (5) of the Criminal Appeal Act), whose appeal against sentence had been referred to the full Court by Channell J., who had refused leave to appeal against the conviction. Appellant, a cook (who was not present), was convicted on June 18 before the Chairman of the North London Sessions on an indictment charging three distinct larcenies (one of a ring pawned for fifteen shillings, another of two gold

1908
10 *July.*
Rachel Bates.

chains pawned for thirty shillings, and the third of some small articles, all the property of her employer), and was sentenced to fifteen months' imprisonment with hard labour. Another indictment for stealing from a previous employer was not proceeded with. Counsel contended that as she had not been previously convicted the sentence was too severe: if she had pleaded guilty to these "petty" larcenies before the magistrates she would probably have only been sentenced to six months. The Chairman said that it was obvious she had been leading a dishonest life for a long time, but this was merely an inference from the suspicions which the police had expressed after the conviction: in fact, the thefts had only extended over a year.

The Lord Chief Justice said the Court must look at the substantial facts. The practice is not to proceed on a second indictment for similar charges, but it cannot be assumed here that there was nothing in that charge, as she had pawned twenty-one sheets belonging to the former employer. Moreover, the value of the things stolen amounted in all to 20*l.*—these were not "petty" thefts. It did not reduce the gravity of the previous theft that prisoner afterwards stole small articles.

Application dismissed.

Henry Pays.

HENRY PAYS.

The Court will not entertain a point submitted to the jury with a proper direction.

Appellant in person appealed against the refusal of Channell J. to allow him to appeal against a conviction for arson on June 19 at Gloucester Assizes before A. T. Lawrence J., who had sentenced him to three years' penal servitude. He now repeated his evidence at the trial.

The Lord Chief Justice, having read the summing-up, said that the rule of the Court was, that where a statement was made at the trial, and was duly left by the judge to the jury with a proper direction, this Court would not interfere.

Application dismissed.

WILLIAM HILLMAN.

1908
10 *July.*
William Hillman.

Part of the allegations of indictment proved—The Court, if necessary, will look at the depositions—Questions inadvertently omitted at the trial.

R. B. Murphy, for the appellant (under sect. 10 of the Criminal Appeal Act), who was not present. He had been convicted on June 22 at the Devon Assizes before Phillimore J., and sentenced, as "an old offender," to nine months' hard labour for stealing a spring-balance and sheep shears. His application for leave to appeal against the conviction had been referred by Channell J. to the full Court. (It now appeared that he wished also to appeal against sentence, and on the Court pointing out that leave only included appeal against conviction, his statement accompanying notice of appeal was referred to as showing that he intended to ask for leave as to sentence also. The Court said that it would allow this application, if necessary.) Counsel submitted that there was not a tittle of evidence to prove the ownership of the spring-balance, and on this ground alone the conviction ought not to stand.

[The Lord Chief Justice: It was enough to prove the ownership of some of the articles alleged in the indictment.]

Further, the evidence as to the shears was very slight. It was true that in the depositions the same witness proved the ownership of both articles, but at the trial he was not asked about the spring-balance.

[Channell J.: Counsel often forget to put a particular question. If it is of importance, the conviction may be set aside; but if not, it does not affect the conviction.]

The Lord Chief Justice said that the Court could go beyond the shorthand note, and look at the depositions. Here appellant's account was that he found the articles; this was put to the jury, and they did not believe it. Moreover, he had often been previously convicted.

Application dismissed.

BIBL. LONDIN UNIV.

1908
3 *July.*
George Coleman.

GEORGE COLEMAN (*a*).

Application to call a witness—Attendance of possible witnesses—Proviso to sect. 4 (1) *of the Criminal Appeal Act—Serious fact inadvertently kept from the judge.*

F. O. Robinson, for the appellant (under sect. 10 of the Criminal Appeal Act), who was present, stated that the latter had been convicted on May 27 at the South London Sessions, before the Deputy-Chairman, of receiving copper wire, and had been sentenced to six months' imprisonment in the second division; a co-prisoner, Wilkinson, having pleaded guilty and been sentenced to four months' hard labour. It appeared that Wilkinson, who was called for the Crown at the trial, had exonerated appellant, who was a carter by trade and was carting the stolen wire, and that the chief fact against the latter, on which the Deputy-Chairman had severely commented in his summing-up, was that he knew the owner of the property was one Keeble, but had made no attempt to communicate with him and had said, on his arrest, that Wilkinson was the owner. It was now admitted by the Crown that Wilkinson was also known as, and was in fact, Keeble. Appellant had interposed during the summing-up to say this, but had been stopped by the warders. Counsel now asked to re-call Wilkinson (and other persons as witnesses to character, but this the Court refused, as the appeal was not against sentence).

S. Lamb, for the Crown, pointed out that there were other suspicious circumstances against appellant, especially his saying to a boy, when the police saw him with his cart, "Take it round the corner." He submitted that the fact that Wilkinson was Keeble did not affect appellant's guilty knowledge.

The Court ordered Wilkinson to be called, but he was not present, and the Lord Chief Justice said that in future the rule must be that where counsel gave notice, on their responsibility, that they would apply for witnesses to be heard, those witnesses must be in attendance. The case was adjourned for the attendance of Wilkinson.

10 *July.* *July* 10.—*Robinson* further objected that Wilkinson had been cross-examined by counsel for the Crown, though he had not shown himself hostile, and that he had been questioned as to

(*a*) See p. 27, above.

1908
10 *July*.

George Coleman.

an alleged conversation between him and the detectives in the absence of appellant.

Wilkinson was called and cross-examined by *Robinson*, who elicited that appellant only knew him as Keeble. He had, in fact, married a Mrs Keeble, whom appellant had known a long time before the marriage.

Wilkinson, re-examined by *Lamb*, stated that appellant had known him by sight, but not to speak to, for four years.

Robinson argued that it was now obvious that appellant had intended to give the correct name of the person who employed him, and had, in fact, told the police the truth. Hence, much of the summing-up ceased to have force. He submitted that the other alleged suspicious circumstances were capable of an innocent interpretation, and dealt especially with appellant's order to the boy to take the cart away.

Lamb submitted that the conviction was not a miscarriage of justice. He explained that his "cross-examination" of his own witness arose from the latter's deafness, which made it very difficult to examine in the ordinary way.

Robinson, in reply.

The Lord Chief Justice: There was here a clear misdirection on the facts, which was not due to any fault on the part of the learned judge. We cannot possibly say that the jury were not impressed by the suggestion that Keeble was a non-existent person —that, in fact, a sham person had been set up— and therefore it appeared that the jury may have convicted the appellant under the direction that his story as to receiving the wire from a man named Keeble was untrue. The Court are satisfied that Keeble and Wilkinson are one and the same person, and cannot say that this verdict would have stood if this mistake had not been made. They were asked to say, in the words of sect. 4 (1) of the Criminal Appeal Act, that no substantial miscarriage of justice had occurred, and if the facts were only consistent with guilt, they would not interfere though a mistake had been made. But here, unless guilty knowledge was proved, it was clear there was no offence; and even assuming appellant—who was a carter by trade—knew that what he was carting was wire, it does not follow that he knew that it was stolen.

Conviction quashed.

1908
10 *July.*

Henry Martin.

HENRY MARTIN (*a*).

Fresh evidence—The Court will not re-try a case on the evidence at the trial properly submitted to the jury and criticised by counsel—Slight mis-statements of effect of evidence by the judge not a ground of appeal—Judge giving his opinion on the facts not a mistake in law.

G. St. John McDonald, for the appellant, who was present, called and examined John Brady. He stated that he was near the spot where the robbery took place, and saw it; he never saw anything of the appellant there; later he saw him coming from his house. He saw two men get around the prosecutor, and they were very different men from appellant; he knew them both by sight. He walked away because he had a bad character, and for the same reason he did not appear at the trial. The day was one in April, between 10 o'clock and 10.30 p.m.

Wells Thatcher, for the Crown, cross-examined.

McDonald pointed out that the prosecutor had made some contradictory statements, which which he dealt *seriatim*. The learned judge had stated to the jury that appellant was the person who first accosted prosecutor and treated him to a drink, and afterwards blew a whistle to call his confederates. This was a clear mistake, as two witnesses stated that appellant was not the man who did these acts. Moreover, there was a misdirection in that the judge told the jury in effect to ignore the evidence of appellant's mother, who swore to an alibi, and that corroboration for prosecutor's story was impossible.

CHANNELL J. delivered the judgment of the Court. The case had been argued as if this Court was to re-try the case, but that is not its function. The verdict was neither unreasonable nor unsupportable on the evidence, nor had there been any miscarriage of justice. The prosecutor was positive about the prisoner's identity, and, as to his contradictions, the jury had heard all these pointed out by the same counsel as appeared to-day, who had quite properly made the same suggestion to them as he had done to-day, and had judged for themselves. The judge may in some small respects have slightly mis-stated the effect of the evidence, but that evidence was in the hearing of the jury.

(*a*) See p. 33, above.

1908
10 *July*.
Henry Martin.

Nor is it a mistake of law for the judge to venture his own opinion on the facts to the jury, as had happened here with the mother's evidence, where the judge's comment was natural: the jury would not think themselves bound by it, and can always form an independent opinion. The only ground on which leave to appeal had been given was Brady's letter, in which one sentence (which the learned judge read) looked like a suggestion that appellant was innocent. It turns out that it says nothing of the kind, and only meant that Brady hoped that appellant would get off. Brady's evidence had only been allowed on the ground that he knew and would say who committed the robbery, and if he knew anything he knew that, but had not told the Court—all he would say was that appellant was not present. Little weight was to be attached to anything he said.

Appeal dismissed.

Henry Simpson and Stanley Beauchamp.

HENRY SIMPSON AND STANLEY BEAUCHAMP.

Surrender as a ground of mitigation of sentence.

The appellants, who were present, appealed, by leave of Pickford J., against their sentences of five years' penal servitude and two years' police supervision, inflicted by the Chairman of the Middlesex Sessions on June 6, for breaking into a railway station, to which offence they had pleaded guilty. They were heard.

Palk, for the Crown, stated that it was true that they had voluntarily surrendered when they heard that another man had been charged with the offence, and that a witness who stated that when they gave themselves up they could not possibly have read of this charge in a newspaper was mistaken.

The LORD CHIEF JUSTICE said that, in view of the previous careers of the prisoners, their surrender was no reason for reducing their sentences.

Appeal dismissed.

1908
10 *July.*

Leopold Ernest Butcher.

LEOPOLD ERNEST BUTCHER.

Misdirection—Sects. 2 (2), 3 (1) (*b*) (*d*), 18 *of the Merchandise Marks Act* (50 & 51 *Vict. c.* 28)—"*False trade description*"—"*Indicate the particular class . . . of . . . goods*"—"*Calculated to mislead*"—*Long use.*

Hume-Williams, K.C. (*St. John Morrow* with him) for the appellant, who was on bail, appealed against conviction under sect. 2 (2) of the Merchandise Marks Act, 1887, on the ground of misdirection.

Appellant was convicted on June 5 after three days' trial before the Common Serjeant at the Central Criminal Court, of having applied to certain boxes of cigars a "false trade description," and was fined £50 or in default one month's imprisonment.

Appellant was a retail tobacconist, and although he was not a manufacturer of cigars and had not himself applied the alleged false trade description to the cigars in question, and there was nothing to indicate that they had been made in England, still they were actually of British manufacture, but were composed for the most part of Havana tobacco, but were not cigars made in Havana.

The case for the prosecution was that the general "get-up" of these boxes (specimens of which were produced), which had on them the Spanish arms, many Spanish words and designs, &c., amounted, as there was no indication that these cigars were made in England, to a false "trade description" within sect. 3 of the Act as being an "indication direct or indirect. . . ." (b) as to the place or country in which the cigars "were made or produced . . ." (d) as to the material of which "they were composed." Appellant had been previously fined £20 for a similar offence.

For the defence a great deal of evidence was called to show that a "get-up" similar to this is in general use, and has been for thirty to forty years, with reference to British-made cigars; that the bulk of the tobacco in fact came from Havana; that the majority of these labels and pictures were made in Germany, and were supplied contemporaneously to cigar manufacturers in Cuba and in England. At the passing of the Act a circular was sent to the manufacturers by the London Chamber of Commerce, drawing their attention to the fact that the word "Havana" must not be used on boxes containing cigars which were British made. One of these boxes did, in fact, have on it the words "A. E. & Co."

1908
10 *July*.
Leopold Ernest Butcher.

in English. Neither box bore on it the word "Havana" (though one contained a map of the island of Cuba), and neither contained the name or an imitation of the name of any real Cuban manufacturer.

It was submitted that appellant was protected by sect. 18 of the Act, and this was relied upon at the trial. Part of that section runs: "Where at the passing of this Act a trade description is lawfully and generally applied to goods of a particular class . . . to indicate the particular class . . . the provisions of this Act with respect to false trade descriptions shall not apply to such trade description when so applied." Here the particular class is that of British-made cigars, and the judge ought to have left to the jury the question of fact as to whether the "get-up" complained of was the same as that in lawful and general use before 1887.

It was submitted further that, in order to determine the question as to the "falsity" of the "trade description," one must look to see whether or not it is likely to deceive a purchaser. The learned judge refused to leave to the jury the fact that the "get-up" was common in the trade for British-made cigars, and hence could not deceive the purchaser into thinking that he was getting a Havana cigar when in fact he got a British-made one; and this misdirection is complained of.

[Darling J.: Suppose I required a real Havana cigar, what must I do?]

You must ask for one, and you will then probably be handed one from a box with the name "Havana" on it, or that of a well-known Havana firm. In such circumstances, if you are handed a British-made cigar, it is an offence.

It is submitted that the real test is deception, and in view of the universal "get-up" of such cigars the judge ought to have left to the jury the question whether or not the "get-up" complained of would lead any person to believe he was buying a Havana cigar when in fact he asked only for "a cigar." If you go into a shop and ask for a Havana cigar and do not get one, then it is an offence, but if you go in and ask simply for a cigar and it is taken from either of these boxes, then it is not, because this "get-up" is so common. At any rate, the question should not have been

1908
10 *July.*
Leopold Ernest Butcher.

left to the jury simply as one of similarity of "get-up" without reference to the proved common use thereof.

[DARLING J.: Referring to sect. 18, it seems to me you are leaving out of account the words of the statute "lawfully and generally applied."]

"Lawfully" means without interference from the law; here length of time supplies the presumption of lawfulness.

It is submitted that the judge in his summing-up should not have ignored the great mass of evidence with reference to the universal user of the trade before and after 1887.

[CHANNELL J.: In order to get the protection of sect. 18 must you not prove that the "get-up" was also used to "indicate" a "particular class or method of manufacture of such goods"? Can you say that this "get-up" was one used to "indicate" British-made cigars?]

The box "indicates" the origin of the tobacco and the shape of cigars as distinct from cheroots. "Indication" means a descriptive "get-up" such as we find here.

[CHANNELL J.: "Brussels" carpet does not mean that made in Brussels, but indicates a special class known in the trade; but you cannot sell anything you like under that name.]

The true test of what is a "false trade description" is stated in the judgments in *Starey* v. *Chilworth Gunpowder Co.* (1889), 24 Q. B. D. 90; 59 L. J. M. C. 13; 62 L. T. 73; 38 W. R. 204; 17 Cox C. C. 55; 54 J. P. 436, and in *Gridley* v. *Swinborne* (1888), 5 T. L. R. 71; 52 J. P. 791.

[CHANNELL J. referred to *Coppen* v. *Moore*, (1898) 2 Q. B. 300; 67 L. J. Q. B. 689; 78 L. T. 520; 46 W. R. 620; 62 J. P. 453; 19 Cox C. C. 45.]

Avory, *K.C.*, and *Bodkin*, for the respondents, the Havana Cigar Protection Association, were not called on.

The LORD CHIEF JUSTICE: It is not seriously suggested that there is not evidence that this trade description is false. It is most

1908
10 *July.*
Leopold Ernest Butcher.

material to notice that if there was any defence it would have been by the appellant proving under sect. 2 (2) of the Act that having taken all reasonable precautions he had no reason to suspect the genuineness of the trade description, and that he had acted innocently. But the appellant, though he had not manufactured the goods and had not applied the mark himself, had not been called to give this evidence, the excuse given being that he had been convicted before of an offence under this statute. This excuse appeared to the Court to be wholly insufficient.

The Court cannot agree to the suggestion that the judge should have left it to the jury to say whether or not they were satisfied that the purchaser had been misled by the false description. It has always been understood that it was the putting on the market goods to which a false trade description was applied which constitutes the offence. The gist of the appeal was the alleged misdirection as to sect. 18. But there was one conclusive answer. What was intended to be protected by sect. 18? Only goods which had in the course of time obtained a secondary name, such as Brussels carpets or the isinglass in *Gridley* v. *Swinborne*, not goods like these cigars which, though British, had for 30 or 40 years had a Spanish description. British goods had, in fact, been marked Spanish, and the Act was to stop this. There was nothing in these boxes to indicate British or to negative Cuban origin.

Appeal dismissed.

Solicitor for the Appellant—*C. Urquhart Fisher.*
Solicitors for the Respondents—*McKenna & Co.*.

J. H. McTAGGART STEWART.

J. H. McTaggart Stewart.

Identification by one person—Jury may compare doubtful with authentic handwriting of prisoner, after proper caution—Alibi set up at trial will not be re-tried—Extreme nervousness is sufficient "illness" to admit deposition—Judge's report of the trial.

C. E. Dyer, for the appellant (under sect. 10 of the Criminal Appeal Act), who was present, applied for leave to call further evidence and, pursuant to leave granted by Pickford J., to appeal against conviction.

1908
10 *July.*
J. H.
McTaggart
Stewart.

The appellant was convicted on June 9 at the Bedford Assizes, under sect. 38 of the Forgery Act, 1861, for endeavouring to obtain certain Post Office letters and procuring their delivery to himself by means of a forged letter, and sentenced by Bray J. to twelve months' hard labour.

On 20th November, 1907, a letter (exhibit A.) was received, signed in the name of F. Stokoe and addressed to the postmaster at Luton, requesting that all letters received in his name be retained until called for, as the writer was shortly arriving in the neighbourhood and had not yet got a proper address.

The case for the prosecution was that this letter (A.) was written by the appellant, and also a letter (exhibit B.) which was proved to have been received about December 16 by one Massingham, purporting to be signed by F. Stokoe. It was admitted that appellant had had previous communication with Massingham.

On 21st December a man called at the post office at 8.30 p.m., and asked for letters addressed to F. Stokoe. Appellant was identified by two persons as being the man who called. He got no letter, as by that time a fraud was suspected. When it was suggested that he should be identified he went away.

The postmaster wrote and asked him to come and see him at the post office.

On the 13th January applicant called at the post office shortly after 6 p.m., and saw Miss Fletcher, and was told to call again. He then went away and returned again at 7 p.m., when he saw the postmaster. To him the appellant made a statement, afterwards taken down and signed by him, in which he denied writing the letter, and also denied calling at the post office on the 21st December.

Miss Fletcher was then called into the office, and identified the appellant as being the man who called on the 21st December.

In his statement appellant said he never did call, but on December 21st he was "bat-folding" from 6.30 p.m. till after 9 p.m.; he subsequently said he was with a man named Mumford, and another named Smith. Mumford was called and said that he had not kept his appointment with prisoner that evening.

At the trial appellant was called and denied writing the letter or calling at the post office on the 21st December. He repeated that he made an appointment with a man named Mumford, but he now said that he thought Mumford did not come, but that he

1908
10 *July.*

J. H.
McTaggart
Stewart.

stayed at home the whole evening. At the trial it appeared that Smith refused to come and give evidence.

Dyer now informed the Court that the appellant intended to say that as Mumford did not come on that evening he remained at home, and did not go bat-folding as he had previously stated. He now desired to call Smith and Smith's brother to show that he really was at home on that evening.

At the trial witnesses were called to prove that it was customary for the appellant to go bat-folding of an evening with Mumford, and in his own cross-examination he explained that when he was first asked as to where he was on the particular Saturday night he, without giving it careful thought, said at once that he was bat-folding, and that after carefully thinking it over he realised he had made a mistake.

One of the Smiths was not called at the trial because (as appellant alleged) he said he was afraid to give evidence.

Miss Fletcher was too ill at the time of the trial to be called, and her deposition was read by leave of the judge.

Dyer now urged, as a point of law, that her deposition should not have been admitted, on the ground that there was not sufficient evidence before the judge that she was unable to be present. The doctor said she was of a nervous disposition, and the fair result of his evidence was that she was, at the worst, suffering simply from nervous prostration, and this, he submitted, was not sufficient ground for reading her depositions; there was no "illness."

He referred to *Farrell* (1874), L. R. 2 C. C. R. 116; and *Thompson* (1876), 13 Cox, C. C. 181. If Miss Fletcher's evidence went, identification rested solely on the postmaster.

[The Lord Chief Justice: What then? If the jury were satisfied as to the handwriting, they would believe that no one but appellant would call for the letters.]

The question of the handwriting of letter B. ought not to have been left to the jury. Stokoe, when called, admitted that he had never seen appellant write; letter B., therefore, ought never to have been left to the jury.

1908
10 *July.*
J. H.
McTaggart
Stewart.

[CHANNELL J.: It was not admitted to show that letter A. was in prisoner's handwriting, but to show that both letters A. and B. were written by a person with the same fraudulent design. Prisoner is connected with A., and not with B. directly, but with B. through A.]

Non constat that the jury did not identify A. through B.

Bussard, K.C., and *Campion*, for the Crown, were not called upon.

Appeal dismissed.

BEFORE THE

LORD CHIEF JUSTICE, MR. JUSTICE DARLING AND MR. JUSTICE WALTON.

WALTER LUCAS.

1908
17 *July.*
Walter Lucas.

Plea of guilty—Ground of reviewing conviction.

The appellant had pleaded guilty at the Reading Assizes to three indictments, two for larceny and one for bigamy, and was sentenced by Lawrence J. on the 4th June to six months' hard labour upon each indictment; to eighteen months' in all.

Turrell, for the appellant (under sect. 10 of the Criminal Appeal Act), who was not present, applied for leave (which had been refused by Channell J.) to appeal against his conviction for bigamy: he alleged that he would not have pleaded guilty had he not been so upset at the time of the trial. Appellant at the age of eighteen and a half met a woman named Collis and lived with her for a considerable time. His mother told him that she would have nothing to do with him until he could produce to her his marriage lines, and in order to satisfy her he purchased a form of a will and signed it, with which she was content. The woman Collis, however, and her relatives required a proper marriage certificate. Appellant met a man, a stranger, and induced him, the stranger, for a payment of £3 and a present of a suit of clothes, to go through a form of marriage with Collis in the name of the appellant. It was the strange man and not appellant who went through the marriage. The latter, therefore, had not committed bigamy by a later marriage. The strange man could not be found, and the story rested entirely upon the word of appellant, which was not borne out by Collis. It was admitted that he had confessed the bigamy when he was arrested, and did not set up this defence at the trial. Moreover, he had been convicted before of forging a false character for himself.

1908
17 *July.*
Walter Lucas.

The Lord Chief Justice: It will require a very strong case and exceptional circumstances to induce the Court to give leave to re-open a case in which the prisoner has pleaded guilty. The reason given for appellant's not having set up his present defence at the trial is quite unsatisfactory.

Application refused.

Solicitor for the Appellant—*Cyril Renton.*

William Mudge.

WILLIAM MUDGE.

Appellant not giving evidence in his defence.

J. R. Cousins, for the appellant (under sect. 10 of the Criminal Appeal Act), who was not present, applied for leave to appeal, such an application having been referred to the Court by Channell J. Appellant was indicted at the assizes held at Exeter on 22nd June for carnally knowing a young girl of the age of ten years. The jury, upon the direction of Phillimore J., found appellant guilty of indecent assault, and he was sentenced to nine months' hard labour. It was now submitted that the whole of the evidence of the chief witness, the child's mother, was untrue; that she had entered into a conspiracy against the appellant, and that her evidence was uncorroborated. The appellant did not go into the witness box at the trial, but made a lengthy statement to the jury from the dock.

The Lord Chief Justice: The judge at the trial told the jury that there was no evidence of the first and more serious offence alleged, but that there was evidence of an indecent assault; but if they had been allowed to take into account all the evidence before them they might have found the more serious offence. The appellant has given no explanation why he did not go into the witness box and give evidence upon oath at the trial, and there was abundant evidence before the jury upon which they found their verdict.

Application refused.

JOHN J. A. SOPER.

1908
17 *July.*
John J. A. Soper.

Further evidence—Calling persons who might have been called at the trial.

W. R. Warren, for the appellant, who was not present (and who had obtained leave from Channell J. to appeal against conviction and sentence), made application for leave to call further evidence. Appellant was a solicitor, and he and his partner, Mason, were on June 29th, at the Central Criminal Court, convicted for the misappropriation of a certain trust fund and sentenced by Ridley J., the former to three years' penal servitude, the latter to five years. Both were appealing.

There were three trustees of the fund, viz., appellant, Mason and one John Robertson, the brother of the *cestui que trust*. The Court was now asked to give leave to call Robertson. He was not called at the trial, as counsel understood that he was to be called by the Crown, and did not know that he was in attendance. He might prove that he had knowledge of the money being retained by the solicitors, and that this was done with his consent.

R. D. Muir, for the Crown, said that John Robertson was one of three trustees, and if, as was now alleged, he knew what had become of the money, then his proper place was in the dock with the other two prisoners. If not, then it was of no use calling him as a witness.

The Lord Chief Justice: In this case counsel is instructed that a certain person, if called, might have given useful evidence. Persons who could have been called at the trial cannot be called in this Court to make out a new case.

Application refused.

Solicitors for the Appellant—*J. A. Soper & Co.*

1908
17 *July.*
William Barrett.

WILLIAM BARRETT.

Statement of prisoner—Corroboration of an accomplice.

Harben, for the appellant (under sect. 10 of the Criminal Appeal Act), who was not present, applied for leave (which Channell J. had refused) to appeal against a conviction of conspiring to utter counterfeit coins, for which he was sentenced at the Central Criminal Court on June 26th by the Common Serjeant to fifteen months' hard labour. Appellant pleaded not guilty at the trial, and the grounds of the appeal were that the whole of the evidence against him was that of an accomplice, that the judge omitted to caution the jury in acting upon such evidence, and further that there was no corroboration.

The Lord Chief Justice: It is not necessary that every part of the evidence should be corroborated, but only some material parts of the evidence. The question is whether there is substantial corroboration in this case. The appellant made a statement which is corroborated by his own accomplice: statements made by a prisoner may be, though they are not necessarily, corroboration. The case was very carefully left to jury by the judge. Moreover, the appellant did not go into the witness box and submit himself to cross-examination.

Application refused.

George Frederick Boyd.

GEORGE FREDERICK BOYD.

Effect of other crimes suspected on sentence—Effect of perjury by prisoner-witness on sentence—Sentence allowed to run from date of appeal being in list.

This was an appeal by leave of Pickford J. against a sentence of twelve months' hard labour passed by the Recorder of Leicester on June 12th, for breaking and entering certain premises and attempting to steal therein.

Lipson Ward, for the appellant (under sect. 10 of the Criminal Appeal Act), who was not present. At trial he pleaded not guilty, and set up an *alibi* stating that at the time he was in a public-house some distance away. He called no witness to prove

1908
17 *July.*
George Frederick Boyd.

this *alibi*, but swore to it himself. It was now submitted that the Recorder was unduly severe, having regard to the fact that this was his first conviction, and that he had hitherto borne a very good character. He was found with housebreaking instruments upon him. The Recorder had evidence before him that there had been recently a very great many burglaries of the kind in the neighbourhood, and perhaps was influenced by the suspicion that appellant had been concerned in some of them.

Marriott, for the Crown, was not called on.

The Lord Chief Justice: Appellant was found to be in possession of housebreaking instruments, of which he gives no explanation. If it appeared that the judge had given him a longer sentence because he had committed perjury, in swearing to an *alibi*, then this Court might have considered the matter, but there appears to be no ground for this suggestion. The judge took into consideration, and rightly so, the fact that there was what may be termed an "epidemic" of burglaries in the district.(*a*).

As this appeal was down for hearing on July 3rd, sentence will run from that date.

Appeal dismissed.

MATTHEW JAMES DODDS.

Matthew James Dodds.

Misdirection—Particular expressions in summing-up—Mode in which cases for prosecution and defence presented.

This was an appeal against a conviction for murder, by leave of Channell J. Appellant was found guilty on July 1st, after a three days' trial, at the Durham Assizes, of the murder of his wife, and was sentenced to death by Grantham J.

S. Fleming, for appellant (under sect. 10 of the Criminal Appeal Act), who was not present, stated that the ground of appeal was that the judge misdirected the jury by mis-stating the evidence on material points. Appellant was forty-four years of age, and up to the time of the crime had borne a good character. He was a cripple, and in walking had to use two sticks, his right leg being of

(*a*) See *Spencer*, p. 37.

1908
17 *July*
—
Matthew James Dodds.

no use. On the 24th June, 1905, he married the deceased woman, whom he had known all his life, and it appeared that their married life was not altogether a happy one, quarrels taking place, it was alleged, by reason of her drinking habits. She was six years his senior, and was possessed of certain house property in her own right in the village. On February 20th the woman was seen to leave her house in the morning. At 12 o'clock (noon) that day the appellant returned to the house for dinner and found his wife the worse for drink. After dinner appellant left for his work, and later on, at about 1.40 p.m., the woman was seen to leave the house and purchase some whisky at a public-house near by. One Littlefare went to appellant's workshop at 2 p.m., stayed there until between 2.15 and 2.30; while in that workshop he saw one Wilkinson, who was working for appellant, go to the latter's backyard, and Littlefare and appellant left the workshop together. Littlefare then went into a shop adjoining appellant's house and stayed there ten to twelve minutes, and heard no screams, while about 2.30 p.m. appellant returned to the house for a joiner's tool. His wife was then in an arm-chair and was drunk. He left her and spoke to Wilkinson, who was working in the backyard, as he went to his workshop. Wilkinson shortly after left the yard, but during the time he was there he heard no screams. About 4 p.m. appellant, upon returning home from his work, found his wife lying across the fender in front of the fireplace with her clothes burnt nearly off her body. He informed the police, and at about 7 o'clock a doctor arrived and examined the deceased by the light of a candle, when he then expressed his opinion that she had not died through burning. An inquest was held on the 22nd February, no medical evidence was called, and verdict was returned that deceased had died from burning, but that the evidence was insufficient to show how the burning was caused. Subsequently appellant was arrested on suspicion of causing her death. When arrested he said, "Well, I can say this, I was not in the house when it happened, that's all." The body was exhumed, and after a post-mortem examination was made, he was charged with wilful murder. The prosecution alleged that appellant went to the house in the afternoon, pulled down the blind, strangled his wife, and then tried to remove the traces of the crime by burning her body, for the purpose of obtaining the deceased's property, there being at the time a will by her in his

1908
17 *July.*

Matthew James Dodds.

favour. A short time before this will was executed, she had on account of his cruelty instructed a young man who knew something of the law to make a will, which disposed of her property in another way; this had been executed, but appellant had got her to re-execute formally the first will in his favour. It was suggested that his motive was to get rid of her before she had an opportunity of again altering her will. For the defence it was said that between 2.30 and 2.50 p.m., cries were heard coming from the house which were those of a maudlin woman in drink, and furthermore, that the appellant was not in the house at all during that time. It was also suggested that from motives of economy the deceased had raked out the ashes of the fire, and that she had seated herself on the fender, as was her habit, had over-balanced herself and hit her head against the fire bars and had fallen with her head over the end of the fender, and in falling had caused the tightening of her shawl around her neck; her death being caused partly by strangulation and partly by asphyxiation from the fumes from the ashes.

The evidence given by the various doctors at the trial was to the effect that death had been caused by strangulation, and they only differed in regard to the length of time during which such strangulation had taken place and caused death. The doctor called by the defence stated that he would have expected to find some of the usual symptoms of strangulation, but he did not. The chief contention on the part of the appellant was that he was not in the house at the time.

The case for the defence was that appellant left the house before the screaming, and evidence was called at the trial to show that he was seen in his workshop at 2.40 by a woman. The learned judge had told the jury that the evidence was "overwhelming" that appellant was in the house at the time the screaming was heard. The mistake was in saying that Littlefare was only in the shop adjoining appellant's house during the interval between the screams—viz., one minute, whereas it was in evidence that he was there between ten and twelve minutes. This mis-statement of the evidence is complained of. Further, the judge said positively: "Then you will find that the prisoner was there." It was submitted that the judge had, in his summing-up, treated certain material facts which were in controversy as being well established—notably whether appellant

1908
17 *July.*

Matthew James Dodds.

was in the house at the time of the screaming or not, and these should have been left for the jury to decide upon.

Counsel was asked by the Court to account for the metal of the woman's stays being found under the grate. It was suggested that she had pulled them off in her agony.

[The LORD CHIEF JUSTICE: If her death was not accidental, who do you suggest strangled her?]

Obviously, the appellant.

Lowenthal, for the Crown (*Mundahl* with him): The evidence that the prisoner was in the house while the screaming occurred was conclusive. Independently of any question of time, it was proved that he went into the house before the screaming began, and was seen to come out after it had ceased. The whole question was whether the strangulation was accidental or intentional. The fact that the body was so packed in a fender only 13½ inches wide, that the clothes were entirely burnt without even scorching the hearthrug, was conclusive against accident. The judge told the jury to acquit if they had any doubt, and to act upon their own judgment, not on his. Upon the evidence the only possible verdict was that of guilty.

The LORD CHIEF JUSTICE: Though some expressions used by the learned judge may be open to criticism, looking at the summing-up as a whole, it cannot be said there has been any substantial misdirection, and if the Court is satisfied with the result of the trial it will not interfere. It is most important that this Court should be in possession of the whole of the facts and appreciate the way in which both the prosecution and the defence were conducted. The chief question was whether the death was accidental or intentional. Two facts were conclusive: the shawl was twisted so tightly round the neck in bands that there was a difficulty in cutting the shawl away; the part of the stays under the grate could not be accounted for by accidental death. The position in which the body was found, as counsel for the Crown had said, pointed in the same direction. Counsel complained that the learned judge had insisted too much on appellant's presence in the house within a certain number of minutes, but as the whole question was whether the death was caused by accident or intention, the minutes were of little importance, if it was believed that

the woman was murdered. There is no doubt but that death was caused by intentional strangulation, and the Court agrees with the counsel for the appellant in saying that if the jury believed the death was so caused, then the appellant must have been the man who committed the murder. Having heard the whole of the facts, the Court has come to the conclusion that it is quite impossible for the jury to say that the death was caused by accident. The judge had pointed out to the jury that they were to be guided by the evidence alone and its effect upon their own minds, and not by any words of his, as the responsibility was theirs. No other verdict could have been arrived at.

1908
17 *July.*
Matthew James Dodds.

Appeal dismissed.

JOSEPH ATKINS (*a*).

Joseph Atkins.

Further evidence—Affidavit of proofs of proposed witnesses—Proof of Insanity.

Appellant now asked leave to call two other additional witnesses whose proofs had been set out in an affidavit by the solicitor for the appellant, which was put in.

The Court refused leave.

Mrs. Atkins, called and examined by *Walker*, said that she was the wife of the appellant. One of his brothers had been insane. Appellant was always suffering from pains in the head. These were very bad and caused him to cry, and she had to bind his head up. He had sunstroke when he was a boy. He had had severe attacks of influenza, the last in February. He was very forgetful. A brother of his was at present in an asylum.

Cross-examined by *J. H. Murphy*, for the Crown: She had told a police inspector since the trial that her husband was not insane when he was sober. He got drunk at times and then would knock her about. The brother became insane through an accident.

Dr. E. H. Lipscombe, called and examined by *Walker*, said that he was the medical officer of H.M. Prison at St. Alban's, and had had appellant under his observation since the beginning of June. He had made inquiries about him, and had found no evidence of insanity, the evidence of which rests entirely upon

(*a*) See p. 45, above.

1908
17 *July.*
Joseph Atkins.

appellant's own history. He was below the average in mental capacity, and had not probably the same control over his actions as a man of similar physique.

Cross-examined by *Murphy:* He could not say he did not know the difference between right and wrong.

Walker asked leave to recall appellant's wife to show that he suffered from hereditary insanity. The Court ruled that as there was no evidence of acts of insanity the proposed evidence would be irrelevant.

Walker submitted that if the judge had known of this evidence he would not have passed so severe a sentence.

The Lord Chief Justice said that in the circumstances it could not be said that the sentence was too severe. If a proper case for clemency on the part of the Crown could be shown at the proper time, the Home Secretary would no doubt consider the case. The sentence would run from the date of conviction.

Appeal dismissed.

Solicitor for the Appellant—*W. T. Boydell.*

Edward Hewson.

EDWARD HEWSON (*a*).

Further evidence—Alibi.

Isaac Knighton, called and examined by *Disney*, said that he was a shoemaker living at Grimsby. The pawnbroker's shop is about ten minutes' walk from his. He remembered a man coming to his shop at about 10 a.m. on the 25th May to have his boot repaired. He did not recognise appellant, but he recognised the boot (produced), which was appellant's, and the repairs on it as his work, which took him about ten minutes to do. He produced the book containing the entry of the job.

Cross-examined by *T. D. Lawrance*, for the Crown.

Mary B. Dean, called and examined by *Disney*, said she kept a refreshment shop in Grimsby, near the docks. She remembered

(*a*) See p. 47, above.

1908
17 *July*.

Edward Hewson.

appellant calling at her shop between 9 o'clock and 10 o'clock one morning, but could not remember which day it was.

She remembered the conversation she had in her shop with appellant on that day, whichever it was. Cross-examined by *Lawrance*.

Lawrance called attention to the fact that appellant had stated to the officer who arrested him, "If I am not tried on Tuesday, I shall plead guilty."

Disney, in reply. Appellant did not admit that he used these words to the officer; what he said was, "I may as well plead guilty, as my character is bad."

The Lord Chief Justice said that the witnesses produced to-day did not establish the *alibi*, for the evidence of Knighton was quite consistent with appellant having been in the pawnbroker's shop. Appellant had told his story as a witness at the trial.

Appeal dismissed.

Solicitor for the Appellant—*Burton, Great Grimsby.*

Solicitors for the Respondent—*Bloomer & Kearsey, Great Grimsby.*

BEFORE THE

LORD CHIEF JUSTICE, MR. JUSTICE LAWRANCE AND MR. JUSTICE WALTON.

R. C. MASON AND J. J. A. SOPER (a).

1908
23 *July*.
R. C. Mason and J. J. A. Soper.

Appeal against conviction and sentence—"Intent to defraud"—Sect. 80 of the Larceny Act, 1861 (24 & 25 *Vict. c.* 96).—*Particular expressions in summing-up—Particular answers of witnesses.*

Ernest G. Palmer, for Mason: The appellants were formerly members of a firm of solicitors, and in 1903 joined in an administration bond of the estate of one James Robertson, who died intestate, and a deed of trust was entered into, the trustees being Mason, Soper and John Robertson. One of the beneficiaries under the deed was Jessie Robertson, a minor. On 30th April, 1906, part of the trust property was sold, all the trustees executing the assignment, and the purchase price, a sum of 173*l.* 4*s.* 2*d.*, was paid to Mr. Wood, a partner of the appellants, who acted as solicitor to the trust. The money, instead of being paid into the trust account at the Birkbeck Bank, was paid by Mr. Wood, for reasons connected with book-keeping (as he alleged), into the firm's account at the Union Bank. At that time the firm had two accounts, the balance at one of them (the Union Bank) being 1*l.* 4*s.* 3*d.*, the other (at the London and South Western Bank) being 10*l.* in debit. By the end of June, 1906, the whole of the 173*l.* 4*s.* 2*d.* had disappeared. The firm had certain claims against the fund for professional services, and the indictment charged the appellants, under sect. 80 of the Larceny Act, 1861, that being trustees of property for the benefit of another person they did, with intent to defraud, appropriate the same to their own benefit. Appellants contended that there was no evidence of an intent to defraud, as they had reason to believe that at any time their cheque for £145,

(a) See p. 63, above.

1908
23 *July*
R. C. Mason and J. J. A. Soper.

being the net amount of the trust fund in the firm's hands, would be met, as there was evidence that they could rely upon an overdraft at their bank for £50 or £60, and the account would be from time to time in funds, money due to the firm being paid in at the rate of £100 per month. There was no evidence that at or about the time they received the money they intended to appropriate it to their own use; hence *Tatlock* applied. (1876), 2 Q. B. D. 157; 46 L. J. M. C. 7; 35 L. T. 520; 13 Cox C. C. 328; C. C. R., per Cockburn C. J. at 164 and 165, per Kelly C. B. at 166 (Q. B. D.).

[The Lord Chief Justice: That case was under sect. 75 (repealed), and has no relation to sect. 80.]

The money drawn by appellants was admittedly used for the firm's office expenses and not appropriated to appellants' own use. As the firm was solvent, they intended to replace out of the current incomings. On 11th August, 1906, a statement of the firm's position was drawn up by Wood. It showed a surplus of book debts over liabilities of about £500. By an agreement on that day Mason and Soper submitted to be charged each with half the above £145, on the ground of their excessive drawings from the business shown on the statement. That agreement was no admission of a breach of trust; it was only a provision to equalise drawings. The judge misdirected the jury in not pointing out to them that this surplus of £500 showed an ability to pay the £145 if called upon by John Robertson, the other trustee, though in fact John Robertson never did so call on them before the dissolution of partnership in 1907. This may have been a case of carelessness and bad methods of business, but no criminal intent was shown by the facts. Hence the learned judge, assuming wrongly that the trust deed directed the proceeds of sale to be paid into the Birkbeck Bank, so told the jury and so misdirected them; and in treating the state of the firm's accounts subsequent to May 5th, 1906, (the date at which the misappropriation was laid) as relevant to the issue, he again misdirected them.

Muir for the Crown: May 5th, the date alleged in the indictment, was the first date on which money was drawn from the bank.

[*Walton J.*: The date is immaterial.]

1908
23 *July.*
R. C. Mason
and
J. J. A.
Soper.

W. R. Warren, for Soper: The learned judge never left the question whether there was any intent to defraud to the jury at all, yet the use of the money might have been quite innocent. If it was he ought to have told the jury to acquit. Nor did he tell the jury that in the arrangement of August, 1906, £145 was expressly provided for as a debt due to Miss Robertson. Appellant had used the money with the full knowledge and consent of John Robertson. The learned judge had also said over and over again: "These men have had the money and have not repaid it," a remark prejudicial to a fair hearing, as leading the jury to believe that the non-repayment was the criminal offence.

R. D. Muir, for the Crown, was not called upon.

The Lord Chief Justice: The Court has been asked to re-try this case; this, as the Court has already stated, it will not do. Counsel who appear in this Court must bear this in mind, for the administration of the Act will become impossible if they address the Court on topics proper only to be addressed to the jury at the trial; the Court hopes that this ruling will be respected. There was a substantial point to be argued, namely, whether the learned judge had misdirected the jury. The appellants were solicitors and trustees. The firm of which they were members, whatever may have been their dealings before April, 1906, were in this position. Although all their expenses were running on, and the accounts from which their office expenses were paid were at two banks, the balance at one was a little over 1*l.*, and the other was 10*l.* in debit. It has been suggested more than once that because this money was used for the purposes of the firm's business, it was not used for appellants' own purposes. The Court cannot accede to that view, for appellants were liable for the firm's expenses. They did in fact use these trust funds, with the result that in June the funds had disappeared. The trust account was at the Birkbeck Bank, and no one denied that in ordinary circumstances this money ought to have gone there. Ridley J. told the jury that appellants were bound to pay it into that bank, and it would not be going too far to say that at a very early stage after they received it in April they were so bound. On August 11th the three partners *inter se* signed a document which at any rate goes far to show that appellants had had the money, for by that document they undertook to repay it,

1908
23 *July.*

R. C. Mason and J. J. A. Soper.

each to pay one-half. It is true that the fact that they accepted this responsibility does not show their fraudulent intent, but is evidence of their receipt of the money, and that their possession of it was not the result of some miscellaneous negotiations resulting in a balance being due from them. From that time the money was never repaid, and, up to the month of July, 1907, when Mr. Wood undertook to repay it, no attempt was made to put the trust fund right. How Mr. Wood's undertaking can be used to negative an attempt to defraud by the appellants the Court cannot understand. Can it be said that on these facts, on a proper direction, it was not open to the jury to find that in the stress of circumstances in which they found themselves they intended to appropriate this money to their own use in the hope that some day they might be able to pay it back? The existence of that hope does not prevent it being a criminal offence, and is a very common circumstance in offences of this nature. The prosecution said this was a case of fraud and the defence that it was one of negligent dealing, and that was the whole question for the jury. Counsel's argument on the accounts amounted to there being a possibility that a cheque which was never drawn would be honoured. If there had been in the summing-up any substantial misdirection, the Court would have given effect to any argument based on it. Summings up are not to be criticised because particular expressions are or are not to be found in them, unless they amount to a misdirection. A summing-up is not a lecture or law; it must be looked at from the point of view of the questions raised at the trial. It is not suggested that the prosecution was improperly launched, the observations of the counsel for the prosecution being directed to the question of intent to defraud, the defence attempting to show that there was no such intent. The Court must look at how the case was conducted. If conducted on a wrong view of the law, the Court ought to interfere. Except for a few chance epithets which may have been suggested to the judge's mind by the way in which the case was conducted, there is nothing in the summing up as a whole to which the law can take exception. The observation to the jury "not to allow people to do with impunity what has here occurred" had perhaps better not have been made; but to suggest that because the judge had said that he would tell the jury to eliminate some-

1908
23 *July*.
R. C. Mason and J. J. A. Soper.

thing from their minds, and then in his summing up had omitted to repeat the observation, the verdict could be set aside, was not reasonable. It was equally unreasonable if a particular answer of one witness conflicted with that of another or one of his own: you cannot pick out a particular answer of a particular witness and say the jury should not believe it. The learned judge told the jury that they must find appellants guilty of an intent to defraud before they could convict them. The defence set up was carelessness and a want of system; and the jury were directed that that would not be a criminal offence, and, in effect, the learned judge told them that if they accepted this defence they must acquit. Over and over again it was urged by the defence that this was only a breach of trust, but some breaches of trust were intended to be dealt with by sect. 80 of the Larceny Act.

With regard to the sentence, the Court has already pointed out that on such appeals by men in positions of trust, such as solicitors and bank clerks, it will only interfere when the sentence is unduly excessive. When dealing with persons on the roll of solicitors found guilty of defrauding those who in many cases cannot afford the loss, the Court ought not lightly to interfere. The learned judge at the trial had marked the difference between the cases of the two appellants.

Appeals dismissed.

Solicitors for the Appellants—*Moulder; J. A. Soper & Co.*

BENJAMIN PEARSON.

Benjamin Pearson.

(1).

No evidence to go to the jury a point of law—Statement of prisoner read over to him and co-prisoner not evidence against the latter—Whether general verdict on indictment under sect. 92 of the Larceny Act, 1861, is good where there is no evidence of stealing, quære.

Graham Milward, for the appellant, who was not present: The appellant was indicted with four others at the Staffordshire Quarter Sessions, on July 1st, with stealing and receiving locomotive tubes to the value of £15, and sentenced to eighteen months' imprison-

1908
23 *July*.
Benjamin Pearson.

ment with hard labour; two, including one Bennett, were acquitted. The only evidence against appellant was the fact that he had sent Bennett, who was his carter, with a cart to fetch something, and that he had returned with locomotive tubes alleged to be part of some stolen a day or two before, which have not been found; and a statement by Bennett, reduced into writing and read over to Bennett and appellant together in the cells, for the purpose of making it evidence, alleged that appellant had sent Bennett with a man to fetch some things which the man would show him. This statement the jury were not told to disregard. *Gavin* (1885), 15 Cox, C. C. 656.

[The Lord Chief Justice: That statement is not evidence.]

Appellant's evidence was that the man had offered to sell him "scrap." Bennett was not called.

There was nothing to show that the tubes in appellant's cart were part of the stolen property; no details as to diameter, length, weight, &c. were given. This took place in the Black Country, where such things were made in great numbers. Again, the possession of Bennett was not the possession of appellant in the absence of evidence of knowledge on appellant's part. Appellant never had possession or control, for as soon as he saw the tubes in his yard, he ordered them to be taken out. Even if he was bargaining for the goods, that was not enough, without exclusive posession. *Wiley* (1850), 2 Den. C. C. 37; 20 L. J. M. C. 4. Further, as it was not suggested that appellant had stolen, a general verdict of guilty could not be supported on an indictment of two counts for stealing and receiving respectively.

R. J. Lawrence, for the Crown: The evidence for the defence strengthened the case for the prosecution. True, appellant had ordered the tubes to be taken away, but he admitted he did not know, and did not enquire, the name of the man who offered the "scrap." He admitted that the sample of the stolen tubes produced was like those in his cart.

[Walton, J.: The verdict was a general one, and you must support it on both counts. What evidence was there of stealing?]

That of possession of recently stolen property. The evidence of receiving was stronger.

1908
23 *July*.
Benjamin Pearson.

[The LORD CHIEF JUSTICE: On an indictment under sect. 92 of the Larceny Act, a general verdict of guilty may mean that prisoner stole the thing.]

Milward in reply.

The LORD CHIEF JUSTICE: This conviction cannot stand. There was not sufficient evidence, when the case for the prosecution closed, to be left to the jury, either on the point whether the goods formed part of the stolen property, or whether they were ever in appellant's possession. Of course, if the evidence for the defence supported what was wanting the Court would not interfere. If the prosecution rely on the statements of appellant they must take them as they are; and the evidence was that appellant sent Bennett to fetch something, and that when he returned with the tubes he refused to have anything to do with them. There was no evidence of physical possession of the tubes by appellant. The Court has very great doubts, also, whether in any case the verdict, which was returned on both counts, could stand, there being no evidence of stealing.

Conviction quashed.

Solicitors for the Appellant--*Willcock & Taylor, Wolverhampton.*

(2.)

No evidence to go to the jury--In larceny possession of servant is not possession of master unless the latter knows and consents.

There was a second appeal by the same appellant against a conviction on July 2nd by the same jury as in the last case for receiving stolen pig iron on May 5th; he had been sentenced to twenty-one months' hard labour (concurrently with the former sentence). Bennett, with appellant's cart, was near the stolen property, a long way from appellant's premises. He and another, who were convicted with the appellant, were seen to lift a "pig" as if about to put it in the cart, but on catching sight of the police put it down, and moved the cart to a heap of "scrap" iron, to fetch which (the defence was) appellant's wife had sent Bennett and the cart, appellant himself knowing nothing of the matter.

The same counsel appeared.

1908
23 *July.*

Benjamin Pearson.

R. J. Lawrence, for the Crown: Bennett was the appellant's servant, and was working with the latter's cart and in his time. Even without his knowledge, that constitutes possession by the appellant. Appellant had control over Bennett, and that was enough on the authority of *T. Smith*, (1855), Dears. & P. C. C. 494; 24 L. J. M. C. 135; 1 Jur. (N. S.) 575; 3 W. R. 484; 6 Cox C. C. 554.

Milward, in reply: *Smith's case* is in appellant's favour, as it shows that the master must have guilty knowledge. Appellant gave notice denying all knowledge of the facts. The jury may not have believed him, but mere unsatisfactory evidence of a defendant cannot supply affirmative evidence where the prosecution has produced none. The case should not have been allowed to go to the jury.

Mr. Justice Walton delivered the judgment of the Court. No doubt the possession of the servant may be the possession of his master, even for criminal purposes, but not unless there is evidence that the latter was aware of and consented to it. There is no such evidence in this case.

Conviction quashed.

Frederick Charles Dewberry.

FREDK. CHAS. DEWBERRY.

Identification of stolen property—Prisoner not calling person from whom he got the stolen goods—Shorthand note omitting questions (but not the answers).

E. J. Williams, for the appellant (under sect. 10 of the Criminal Appeal Act), who was not present, and to whom Channell J. had refused leave to appeal against conviction and sentence. Leave was now also sought to call further witnesses.

On 2nd July, 1908, appellant was indicted (together with Fredk. Wm. Davis) at the West Kent Quarter Sessions for having, on the 4th May, feloniously stolen 9 bags and 9 cwt. of potatoes, and for feloniously receiving the same. Appellant and Davis both pleaded not guilty. They were convicted; Davis being sentenced to four months' imprisonment with hard labour, and appellant to three years' penal servitude.

On 4th May a man named Jupp was "dibbling" holes in a field

1908
23 *July*.

Frederick Charles Dewberry.

in order to plant potatoes. Thirty bags (each containing 1 cwt.) of potatoes were brought to the field in a cart, and distributed in various heaps in different parts of the field. Jupp stated that he saw four men walking by the cart, and recognised one of them as appellant.

The police found wheel tracks leading from the field and potatoes spilt about the ground. A bag of potatoes was found at one Allen's. Jupp identified this bag by a slit and certain tar marks as one belonging to his employer. Allen stated that appellant sold him 2 cwt. of potatoes on the 4th May. Some samples which had been taken from the field were produced in Court and shown to him, but he could not say they were of the same variety as those bought from appellant; neither could he identify the bag.

Appellant said he had bought the potatoes from a man near the school. He called no witnesses.

Counsel contended that the evidence was insufficient. There was nothing to show that the potatoes which appellant had sold to Allen were the same, or even similar to those which had been missed. When the samples were shown Allen said that those he had bought were smaller—"middlings"—while those used in the field were known in the district as "Up to Date." Neither could Allen identify the bag, and although Jupp said that he could recognise it by a slit and tar spots, it was quite possible that there was more than one bag in the district which had been spotted with tar and slit.

In answer to the Court counsel said that appellant did not call the man from whom he had bought the potatoes.

The prosecution had contended at the trial that the potatoes were taken away in a cart or barrow, because of certain wheel marks found at the side of the field, but appellant had never been seen with any barrow, although Allen stated that he had seen certain men pass his shop with a barrow after the potatoes had been sold to him. Those men had apparently never been found.

The Lord Chief Justice: There was evidence on which the jury might act. The identification of the bags was clear. In view of appellant's many previous convictions, the Court would not interfere with the sentence.

Application refused.

1908
23 *July.*
Frederick Charles Dewberry.

Williams complained of the form in which the shorthand note had been taken, the answers only being given.

The LORD CHIEF JUSTICE agreed, but said that very few slips had been made by the shorthand writers throughout the country. A difficulty had arisen in some cases by the fact that the shorthand writers had only been appointed at the last moment.

William R. Anthony.

WILLIAM R. ANTHONY.

Corporal Punishment.

Appellant, who was not present but made his application in writing, had been sentenced as an "incorrigible rogue" on July 1st, by the Chairman of the Dorchester Quarter Sessions, to twelve months' imprisonment with hard labour and to two whippings, at an interval of three months, each of ten strokes with a birch rod. He had previously been summarily convicted many times. Channell J. had refused him leave to appeal against his sentence: in effect, he desired to appeal only against the whippings.

The LORD CHIEF JUSTICE: This was a legal sentence and, in view of appellant's previous history, one which the bench might well inflict. This will not affect any decision the Home Office authorities might arrive at.

Application dismissed.

George Joyce and George Brown, *alias* Frederick Brockwell.

GEORGE JOYCE AND GEORGE BROWN, *alias* FREDERICK BROCKWELL.

Prisoner's admission of a previous conviction no ground for quashing conviction —Slight mistakes in receiving evidence.

Rowsell, for the appellants (under sect. 10 of the Criminal Appeal Act), who were not present, and asked for leave to appeal

1908
23 *July*.
George Joyce and George Brown, *alias* Frederick Brockwell.

against convictions and sentences of three years' penal servitude for burglary at the Surrey Quarter Sessions, held at Kingston on June 30th. This application had been referred to the full Court by Channell J. The trial was unsatisfactory for the following reasons: (1) Evidence of property alleged to be the proceeds of another burglary being in the possession of appellants was given, and further, if such evidence was given in support of the count for receiving stolen property, there was no evidence that such property was "other property stolen within the preceding twelve months." (2) The jury were not warned that a statement by Brown, viz., "Joyce has led me into this," and made in the absence of Joyce, was not evidence against Joyce. (3) The fact of there having been a previous conviction against Brown was conveyed the jury (a) by a police constable stating that Brown had said "I suppose it means six months this time," and particularly (b) by the Chairman asking Brown, "Did you say to the policeman what he says, 'I suppose it means *another* six months this time'?"

The Lord Chief Justice: No question of misdirection arises here. A conviction cannot be set aside for every small slip in the evidence. If prisoners tell the jury of their previous convictions, it cannot be helped.

Applications dismissed.

SARAH REES.

1908
24 *July*.
Sarah Rees.

Habitual drunkard—Short sentences—Imprisonment or penal servitude?

Lord Tiverton, for the appellant (under sect. 10 of the Criminal Appeal Act), who was not present. This was an appeal from a refusal of Channell J. to grant leave to appeal against a sentence of three years' penal servitude, passed on June 2nd by the Recorder at Cardiff Quarter Sessions, for larceny of a purse containing 1*s.* 6*d.*, some pawn tickets, and a piece of lace. She had been several times previously convicted, often for drunkenness; drink was the real cause of her offence.

The Lord Chief Justice: This sentence is the only chance

1908
24 *July.*
Sarah Rees.

there is of keeping the appellant away from drink. The Court agrees that for this particular offence alone she ought not to receive such a sentence as this. But a time comes when short sentences become useless. The appellant has been convicted ten times, no doubt for trumpery thefts, and also eight times for drunkenness, and has served many short sentences. The only question is, how is this to be stopped? It is clear that a sentence of imprisonment will do no good—she has already served nine months. Only a long detention can reclaim her, and the shortest sentence of penal servitude that can be passed is for three years. From many points of view imprisonment is more severe than penal servitude. The Recorder exercised a wise discretion in passing this sentence.

Application refused.

Barnett Sovosky.

BARNETT SOVOSKY.

Identification—Objection not taken at the trial—Mistake in summing-up—Further evidence.

Symmons, for the appellant (under sect. 10 of the Criminal Appeal Act), who was not present. This was an appeal against the refusal of Channell J. to grant leave to appeal against conviction, and also an application for further evidence. Appellant was convicted on June 30th at the North London Sessions of stealing and receiving boots, and sentenced by the Deputy-Chairman to twelve months' imprisonment with hard labour. The question was one of identity. On March 27th a man and a woman entered theprosecutor's premises to buy boots. They said they were not satisfied, and went out. After they had gone, the boots in question were missed. At the trial the jury were told that the appellant's wife had been convicted of stealing boots from this same shop. In point of fact, it was from another shop. When the prosecutor came to identify the appellant, some three months after the offence, he was placed among men who he said were quite unlike him in appearance. The appellant was, presumably from his name, a Polish Jew, and would probably be different in appearance to an Englishman.

1908
24 *July.*
Barnett Sovosky.

[The LORD CHIEF JUSTICE: This point was not raised at the trial. It is not the function of the Court to decide whether the men amongst whom appellant was placed were of similar appearance to appellant. The Court has no means of deciding such a point.]

It is the function of the Court to see that there is not a miscarriage of justice. The evidence was that the man who went into the shop wore a moustache. He wished to call a barber to prove that he never had a moustache. The Deputy-Chairman had stated, in summing-up, that another witness (Mrs. Young) had identified him. This was a slip on his part, and referred to the evidence on the depositions in another charge against appellant.

The application was granted, with leave to call the barber.

Applications granted.

WALTER JOHN BROWN.

Walter John Brown.

"Incorrigible rogue"—Sect. 5 of the Vagrancy Act, 1824 (5 *Geo. IV. c.* 83)—*Appeal only against sentence under sect.* 20 (2) *of the Criminal Appeal Act.*

The appellant in person appealed from the refusal of Channell J. to grant him leave to appeal from his conviction at Petty Sessions as an "incorrigible" rogue, and from the sentence of ten months' hard labour passed at the North London Sessions by the Deputy-Chairman on June 30th. Legal aid had also been refused.

The LORD CHIEF JUSTICE: There is no question about the law in this case. Under sect. 5 of the Vagrancy Act, 1824, a rogue and vagabond can be sent by Petty Sessions to Quarter Sessions for punishment. Under sect. 14 there is an appeal against the conviction to Quarter Sessions. The only duty of Quarter Sessions in this case was to inflict punishment only, and the act of Quarter Sessions is to do this, and they do not convict. The only evidence they hear is directed to the previous life of the prisoner.

1908
24 *July.*
Walter John Brown.

Therefore there cannot be an appeal under sect. 20 (2) of the Criminal Appeal Act as from a conviction.

Application refused.

Harry Bayley.

HARRY BAYLEY.

Bigamy - Bonâ fide *belief in invalidity of first ceremony*—Tolson's Case *distinguished.*

Waterlow, for the appellant (under sect. 10 of the Criminal Appeal Act), who was not present. Channell J. had refused to grant leave to appeal against his conviction for bigamy. Appellant had been sentenced at Maidstone Assizes on July 7th by Mr. Commissioner Rawlinson, K.C., to twelve months' hard labour. The defence set up was that he thought his first marriage invalid, because his age at the time he contracted it was seventeen, but he gave it as twenty-four. He had been told that these facts invalidated the marriage by a certificated schoolmaster, who purported to derive his information from a solicitor or from a legal source. The second "marriage" was in 1907. If he honestly believed the marriage invalid, that was a good defence. *Tolson* (1889), 23 Q. B. D. 168; 58 L. J. M. C. 97; 60 L. T. 899; 37 W. R. 716; 54 J. P. 4; 16 Cox C. C. 619; C. C. R.

The Lord Chief Justice: It is suggested in this case that the appellant honestly believed his first marriage to be invalid because he had been married when under age, and had given his age falsely. It is extremely doubtful whether there was any evidence of that honest belief. There is evidence that he went through the second form of marriage in a false name, and it is hard to resist the suspicion that that was to conceal the fact of the first marriage. Appellant tells a story as to some man giving him information as to the validity of his first marriage. It cannot be suggested that because a man chooses to think that there is some technical informality in his marriage, he can, without further inquiry, marry again. *Tolson* was a different case.

There the defendant had information from various sources of the death of her husband, and the jury found that she acted in good faith and on reasonable grounds.

1908
24 *July.*
Harry Bayley.

Application refused.

HARRY SIMPSON.

Harry Simpson.

Judge's report as to sentence.

The appellant in person applied for leave to appeal against his sentence, his application having been referred to the full Court by Lawrance J., on the ground that the judge had been informed that he lived on his wife's earnings, which was not the case. He had been sentenced, on July 9th, at Bradford City Quarter Sessions, to eighteen months' imprisonment with hard labour for stealing stand-pipes.

The Court stated that the learned judge in his report stated that he did not take that circumstance into account.

Application refused.

CHARLES HAMILTON.

Charles Hamilton.

Sentence wrong in law—Sect. 4 (3) *of the Criminal Appeal Act—Resort to the Home Secretary.*

Cuthbertson, for the appellant (under sect. 10 of the Criminal Appeal Act), who was not present, appealed against sentence by leave of Lawrance J. A point of law also arose as to the sentence. He was sentenced on July 2nd at the Northallerton Quarter Sessions, for larceny of goods valued at 1*l.* 0*s.* 11*d.*—to which he pleaded guilty—to three years' penal servitude, to run *concurrently* with 265 days of an unexpired sentence of penal servitude, the applicant being out on ticket-of-leave when he committed his last offence. The Court had no power to pass this sentence, because by sect. 9 of the Penal Servitude

1908
24 *July*.
Charles Hamilton.

Acts Amendment Act, 1864, the new sentence had to precede the serving of the unexpired term. See also *King*, [1897] 1 Q. B. at 217—218; 66 L. J. Q. B. 87; 75 L. T. 392; 61 J. P. 329; 18 Cox C. C. 447; C. C. R. The result would be that appellant would have to serve 265 days longer than the Court intended. On the merits the sentence was too severe, despite previous convictions.

C. Paley Scott for the Crown.

The Lord Chief Justice: This Court can only interfere under sect. 4 (3) of the Criminal Appeal Act, by striking out the word "concurrent," and this would add to appellant's sentence. If, again, the Court took off the 265 days from the three years, that would reduce the penal servitude to imprisonment, as there is no less sentence of penal servitude than three years; but a sentence of two years' imprisonment is by many considered severer than three years' penal servitude. In the circumstances, the best thing for the appellant is to amend the sentence by striking out "concurrent with the unexpired term of 265 days," leaving the Home Secretary to act as he thinks fit with regard to the 265 days. In the circumstances sentence will run from the date of conviction.

Appeal dismissed. Sentence to run from date of conviction.

Edward Cooper, John Shea and Haslam Stocks.

EDWARD COOPER, JOHN SHEA, HASLAM STOCKS.

Larceny of fixtures to a freehold at common law and under sect. 31 *of the Larceny Act*, 1861 (24 & 25 *Vict. c.* 96)—*On common law indictment, though principal is acquitted, receiver may be convicted of an offence under sect.* 91 *of the Larceny Act—Sects.* 4 (1) *and* 5 (2) *of the Criminal Appeal Act—Variation of verdict.*

Jardine, for appellants (under sect. 10 of the Criminal Appeal Act), who were not present. Appellants, and one Lambert, were charged on a common law indictment, containing a count for receiving, at Leeds City Quarter Sessions on July 4th, with larceny of lead piping which, in fact, had been stripped off a house.

1908
24 *July.*
Edward Cooper, John Shea and Haslam Stocks.

Lambert was acquitted; Stocks was convicted of receiving, and the other two of stealing, and were each sentenced by the Assistant Recorder to nine months' imprisonment with hard labour.

The indictment upon which the prisoners were convicted is not laid under sect. 31 of the Larceny Act, 1861, but is an ordinary common law indictment of stealing and receiving lead.

The facts proved at the trial were, that Lambert went into a basement room in an empty house having a window opening into a yard, cut down a quantity of lead piping, and put it into a bag. Shea and Cooper at that moment appeared in the yard, hauled the bag up through the window, and went off with it on a hand-cart to Stocks, who bought it.

These facts show that the lead piping was attached to and formed part of the realty, and therefore was not the subject of larceny at common law. *Townley* (1870), L. R. 1 C. C. R. 315; 40 L. J. M. C. 144; 24 L. T. 517; 19 W. R. 725; 12 Cox C. C. 59.

A verdict of not guilty was entered against Lambert on this ground. But the cutting and carrying away were all one continuous act, and Shea and Cooper were clearly privy to all the acts of Lambert. They were all three principals in the commission of an offence under sect. 31 of the statute, but committed no offence at common law. Stocks was wrongly convicted of receiving, inasmuch as the property which he received had not in fact been stolen.

Lowenthal, for the Crown: It is admitted that the prisoners cannot be convicted of larceny, but they can be convicted of receiving, and the Court can deal with them under the powers given by sect. 5 (1) of the Criminal Appeal Act.

Sect. 91 of the Larceny Act, 1861, provides that anyone receiving goods the taking of which was a felony "either at common law or by virtue of this Act," knowing them to have been stolen, shall be guilty of felony.

It is clear that Lambert, though not guilty of larceny at common law, had committed an offence under sect. 31 of the Larceny Act, and the prisoners received the goods from him knowing them to have been stolen. The acquittal of the principal makes no difference. There is no inconsistency in finding the prisoners, who were not present at the commission of the crime, accessories before the fact and also receivers.

He cited *Hughes* (1860), Bell C. C. 242; 29 L. J. M. C. 71;

1908
24 *July*.
Edward Cooper, John Shea and Haslam Stocks.

6 Jur. (N. S.) 177; 1 L. T. 450; 8 W. R. 195; 8 Cox C. C. 278, and *Lee* v. *Risdon* (1816), 7 Taunt. 191. He also referred to the proviso to sect. 4 (1) of the Criminal Appeal Act.

[Walton J.: Could you join a charge under sect. 31 with a common law larceny?]

Yes. The indictment would be good, although the prosecution might be required to elect.

Jardine in reply. The proviso to sect. 4 (1) of the Criminal Appeal Act should not be applied where the point is that the prisoners have committed no offence.

As to sect. 5 (1) of the Criminal Appeal Act, the evidence shows that the prisoners Cooper and Shea were not accessories before the fact, but principals in the second degree. Presence at the commission of the crime may be constructive. A principal in the second degree cannot also be a receiver.

The Lord Chief Justice: This case shows the need of a reform in criminal pleading, for it seems a lamentable thing that Lambert should have escaped on a technical ground. In this case four men were indicted in two counts for larceny at common law, and for receiving. The actual offence was that Lambert went into a house and cut away some lead piping. In these circumstances it was admitted that he could not be indicted at common law, but could have been under sect. 31 of the Larceny Act, 1861, and Cooper and Shea might have been liable as accessories. They received the bag with the lead in it, and delivered it to Stocks in circumstances which showed that Stocks was getting stuff he ought not to get. It is said, the jury having convicted, that this appeal ought to succeed because Cooper and Shea were principals in the offence under sect. 31, and nothing else, and could not, therefore, be convicted on a count for receiving. In our judgment there was clear evidence of an offence under sect. 91. It is not the fact that the stealing under that section is confined to goods stolen at common law; the words of the section are "[larceny] either at common law or by virtue of this Act," and by sect. 31, larceny of goods of this kind is made a felony. Therefore there was abundant evidence upon which the jury could have convicted appellants of receiving the goods

1908
24 *July*.

Edward Cooper, John Shea and Haslam Stocks.

knowing them to be stolen. The verdict was one of guilty against Cooper and Shea of stealing, and against Stocks of receiving the piping. If the Court had no discretion, it is possible it might be in a difficulty, having regard to the form of the verdict, but although in some respects this Court has not been granted sufficient powers, in this respect its powers are ample. They are embodied in sects. 4 (1) and 5 (2) of the Criminal Appeal Act. In this case, upon this indictment, there being a count for receiving, there seems to be no doubt that the jury must have been satisfied of facts which proved appellants guilty of receiving. The Court therefore substituted for the verdict found that of receiving, and for the sentences passed, the same sentences on the verdict as amended.

Appeal dismissed.
Verdict varied.

BEFORE

MR. JUSTICE LAWRANCE, MR. JUSTICE RIDLEY AND MR. JUSTICE DARLING.

W. H. NORMAN.

1908
30 *July*.
W. H. Norman.

Severity of sentence—Previous convictions.

Appellant and his son were convicted at Lewes Assizes before Jelf J. on July 3rd, of a series of frauds upon farmers in Sussex, by means of which they obtained hay, straw and agricultural implements without paying for the same and re-sold to other purchasers at a reduced price. The indictment contained twenty-eight counts, charging conspiracy, false pretences, and false devices not false pretences, obtaining credit by fraud, and also in contravention of the Debtors Act. Some of the counts charged prisoners jointly and some only individually. Twelve cases in all were inquired into at the trial, and in respect of all of them appellants were convicted, the elder to five years' penal servitude, and the son to twelve months' imprisonment with hard labour.

P. Sutherland Græme, for the appellant (under sect. 10 of the Criminal Appeal Act), who was not present, said that in view of the facts it was impossible to appeal against conviction, but the sentence was unduly severe. There were previous convictions, but the last of three serious charges was five years before.

Application refused.

WILLIAM RILEY.

William Riley.

Corporal Punishment.

This was an application for leave to appeal against a sentence of six months' hard labour and eighteen lashes of the "cat" imposed by Darling J. at Nottingham Assizes on a conviction for robbery with violence on July 18, 1908.

The applicant was not present.

1908
30 *July*.
William Riley.

LAWRANCE J.: The only question is whether the sentence that has been imposed is a proper one. Appellant lived on the earnings of a prostitute, and having decoyed the prosecutor into a brothel he then robbed him. Appellant had been convicted of the same offence before, but imprisonment did not seem to keep him from crime, and so the learned judge had added this sentence of corporal punishment. The Court saw no reason to interfere with the sentence.

Application refused.

ALFRED ISAAC LOVETT AND HORACE WILLIAM HIPPERSON.

Alfred Isaac Lovett and Horace William Hipperson.

Misdirection—Onus of proof—Further evidence—Names of proposed witnesses and nature of their evidence must be stated.

This was an application for leave to appeal against two convictions for stealing a piece of lead piping from a water-closet in a yard. The case was tried on July 13th at the Norwich City Quarter Sessions, before the Recorder, and Hipperson was sentenced to four months' imprisonment without hard labour, on his undertaking to leave this country for Canada on the conclusion of his sentence, and Lovett was sentenced to twelve months' imprisonment with hard labour. Hipperson also applied for leave to call two witnesses not called at the trial. The evidence against the prisoners was circumstantial. They were seen for a considerable time in the yard in a corner of which the water closet was. The pipe was in the closet at 1 p.m.; appellants were seen in the yard with two other men from about 2 p.m. to 4 p.m., and they were seen to go round into the corner where the closet was. As soon as they had gone the pipe was found to be missing. The defence was that they were in the yard looking for an escaped pigeon, and they both defended themselves and went into the box. One of the witnesses for the prosecution saw a pigeon on the roof of a house in the yard.

Walter Stewart, for the appellants (under sect. 10 of the Criminal Appeal Act), who were not present, said that the learned Recorder had misdirected the jury at the end of his summing-up, when he said: "On the other hand, if the prosecution has satisfied you, as it must—the onus lies upon them—reasonably satisfied you that these men were seen in the yard,

1908
30 *July*.

Alfred Isaac Lovett and Horace William Hipperson.

seen going round the corner—nobody else was there, the lead was taken during that time—then you are justified in coming to the conclusion that the case has been made out against the prisoners in the dock. Weigh the evidence carefully if you will, and if you come to the conclusion to your satisfaction that the prosecution have made out a *primâ facie* case, and the prisoners have not satisfactorily answered it, it is your duty to find them guilty. If you think they have given a satisfactory explanation of the loss of this lead at the time that they were there, it will be your duty to say so by a verdict of Not guilty." These were the last words of the summing-up, and the jury were misdirected by the learned Recorder suggesting that the burden of proof was on appellants. There are other matters in the summing-up. The girl who watched the prisoners said that she watched them from about 2 p.m. The learned Recorder directed them that she said at 2 p.m., although appellants put the time later.

The Court granted leave to appeal. On an application to call two fresh witnesses (on the ground that appellants at the trial did not appreciate the materiality of their evidence), the Court ordered their names to be given and the points which they were respectively to prove to be stated.

Leave to appeal granted.
Leave to call further evidence refused.

JAMES JEFFERSON.

James Jefferson.

Defence of Insanity—There is no appeal against finding of a jury that prisoner is fit to plead and take trial—Sect. 5 (4) of Criminal Appeal Act—Special verdict substituted by the Court.

This was an appeal against a conviction and sentence for murder after a trial before Bigham J. at Leeds Assizes on July 20th, 1908. Appellant was present.

At the trial the issue was first tried as to whether the prisoner was fit to plead, and the jury found that he was then of sound mind and understanding, so as to be capable of pleading and taking his trial for the crime of murder.

1908
30 *July*.
James Jefferson.

The facts of the case were not in dispute. Appellant was found by one Helliwell on May 5th cutting off the head of a woman in the road with a table-knife. When spoken to he continued cutting off the head. Helliwell went for help, and returned with two other men. Appellant was then found in a field close to the road cutting off the arm of the woman, and when remonstrated with he continued to cut off the arm. When threatened with a crowbar he dropped the table-knife and was secured, but he insisted on taking with him over the wall from the field into the road the woman's umbrella, hat, and corsets, and he spoke to the men of the sum of money he would get on the sale of these articles. The woman's purse, with money in it, was found on him. The woman was naked but for a stocking, and there were twenty-eight knife wounds in her body. On May 1st he had been discharged from prison at Newcastle. In the opinion of the prison officials he was quite sane during his stay there.

The defence set up at the trial by counsel was that of insanity. Three doctors were called, examined, and cross-examined at length. Dr. Edgerley, the doctor at a neighbouring asylum, stated that he had formed the opinion that the prisoner was, at the time of the commission of the offence, insane, but that he knew he was killing a woman. He did not think prisoner knew at the time that he was doing what was wrong. This doctor had interviewed prisoner on the day of the trial for forty minutes, and on the previous day for over an hour. Dr. Exley and Mr. Ellison, the prison doctors, who had kept prisoner under constant observation from May 6th to July 20th, were of opinion that he knew he was doing wrong, but he did not know how wrong the thing was, nor did he know the quality of the act or appreciate it. All three doctors were of opinion that the prisoner suffered from hallucinations and delusions. Bigham J. at the conclusion of his summing-up directed the jury that the defence must prove that prisoner did not know he was doing wrong at the time he committed the act.

The jury found the prisoner guilty, and he was sentenced to death.

A. J. Lawrie, for the appellant (under sect. 10 of the Criminal Appeal Act), proposed to argue that the finding of the jury that prisoner was fit to plead was wrong, but the Court pointed out

1908
30 *July*.

James.
Jefferson.

that the Criminal Appeal Act gave no appeal against such a finding.

He then argued on the medical evidence that the Court should deal with appellant under sect. 5 (4) of the Criminal Appeal Act.

[DARLING J.: The Court could avail itself of the provisions of sect. 9 (*b*) or (*e*) of the Act, and appoint persons of special knowledge to examine appellant.]

Bruce Williamson (and *Lowenthal*), for the Crown, said that the peculiar difficulty was that the jury had not accepted the view of the doctors called by the Crown as to appellant's insanity. However, having regard to all the facts of the case, it could not be contended that the verdict was satisfactory.

LAWRANCE J.: In the opinion of the Court this verdict was unsatisfactory, and ought not to stand. The Court has read the evidence of the doctors. There was very strong evidence before the jury that this man at the time he committed the offence was not in a state of mind to make him responsible for his actions. No question has arisen here as to the direction in the summing-up of the learned judge. In the opinion of the Court the verdict of the jury ought to have been that the appellant was insane at the time he committed this act. The order must be that the sentence be quashed, and the appellant kept in custody as a criminal lunatic under the Trial of Lunatics Act, 1883, as if a special verdict had been found by the jury under that Act.

Sentence quashed: Special verdict substituted.

1908
30 *July*.

Barnett Sovosky.

BARNETT SOVOSKY (*a*).

Misdirection—Misstatements of fact in summing-up prejudicial to prisoner—Form of order where conviction on one indictment quashed and other indictments are untried.

Symmons, for the appellant, who was present. This case turns on a question of identity. The evidence for the prosecution was that on March 27th a man, a woman and a child came into the shop of the prosecutor, one Lewis. They were shown several pairs of boots and, apparently dissatisfied with what they saw, they went away. Very shortly after they had left, a pair of ladies' shoes was found to be missing. Three months later, appellant was given into custody on the information of his wife, who said that he had stolen certain pairs of boots; but she was not called at the trial. When appellant was in custody three months later, the prosecutor Lewis identified him from among eight other men at a police station as the man who had come to his shop with the woman and child on March 27th. When arrested appellant had no moustache, but Lewis said that at the time he came into the shop he was wearing a "slight moustache." The Deputy-Chairman said to a detective-sergeant called for the prosecution: "Is it true that his wife got twenty-one days for this?" The witness answered: "Yes, she was sentenced to twenty-one days' hard labour."

The defence was that Sovosky had before March 27th quarrelled with his wife, and that she was at that time going about with another man. Several witnesses were called for the defence, who gave appellant a good character, and stated that he never wore a moustache, but one of them added that he might have worn one in America. The prosecution then called a warder, who proved that appellant was convicted of unlawful wounding on August 9th, 1906, and that on August 10th, 1906, a photograph was taken of appellant at Chelmsford Prison. In this photograph (produced) appellant was shown with a slight moustache and no beard, and the warder said that when under his charge appellant wore a moustache. The photograph was put to a brother of appellant

(*a*) See p. 84 above. Appellant had been ordered to be deported on the expiration of his sentence.

1908
30 *July*.
Barnett
Sovosky.

called for the defence, who recognised it as a portrait of appellant. It was plain that the moustache shown on the photograph was merely the growth after appellant was in the prison.

[DARLING J.: Why had not the beard grown also?]

An officer had cut the beard and moustache with scissors, but he had not cut the moustache so closely. Appellant had obtained leave to call a witness to prove that at the time appellant was said to have entered Lewis's shop he was not wearing a moustache.

David Stern, a barber, was called and examined. He stated that he carried on a barber's business and knew the appellant as a customer of his. The last time appellant had been in his shop was five or six months ago. He could not say exactly in what month. At that time appellant was not wearing a moustache.

Symmons admitted that this evidence did not help his client. He read the summing-up of the learned Deputy-Chairman. The Deputy-Chairman had made three mistakes of fact when dealing with the evidence in his summing-up. First, he said that this man's wife was convicted of this offence. But she was not convicted of stealing these shoes at all, but of another offence of stealing on May 9th, some six weeks later; appellant had been indicted on that charge, but neither that nor another indictment against him had been tried. Secondly, he said that appellant was "identified at once by the *prosecutors*. *They* said, 'Oh, yes, that is the man.'" Appellant was only identified by Lewis three months after the theft—the only evidence against him. Thirdly, the learned judge said: "Then Mrs. Young identified him also." That was not so, and indeed there was no Mrs. Young in *this* case at all, but there was a Mrs. Young who was a witness in one of the other indictments.

W. A. Metcalfe, for the Crown, admitted that there were inaccuracies in the summing-up of the learned Deputy-Chairman.

DARLING J. said: The learned Deputy-Chairman had stated in his summing-up to the jury that matters were proved which were not proved. So far as these statements were true, they were true

1908
30 *July.*
Barnett
Sovosky.

of other places and of other times. It was impossible for the Court to say that such inaccuracies might not have been prejudicial to appellant.

Conviction quashed.

Appellant having been brought up in custody from Wormwood Scrubbs Prison, a question arose as to his detention until the other two indictments against him were disposed of.

The Court, on *Symmons's* application, made no order as to these indictments, but made the following order:—"*This Court doth allow the appeal, and doth quash the conviction, and direct a judgment and verdict of acquittal to be entered, and doth order that the appellant be remanded in custody to Brixton Prison till he be taken in due course to the North London Sessions to take his trial upon any other indictment or indictments that have been found against him by the grand jury, or until he be otherwise lawfully discharged from the same.*"

BEFORE

THE LORD CHIEF JUSTICE, MR. JUSTICE LAWRANCE, AND MR. JUSTICE DARLING.

MARY SOCKETT.

1908
31 *July*.
Mary Sockett.

Sect. 58 of the Offences against the Person Act (24 & 25 Vict. c. 100)—Indictment under second half of that section need not allege pregnancy of woman.—Sect. 5 (2) of the Criminal Appeal Act.

Appellant, who was on bail, was tried before Darling J. at Warwick Assizes on July 13th, and convicted under sect. 58 of the Offences against the Person Act, 1861 (24 & 25 Vict. c. 100), for that she "was present, aiding and abetting and assisting" one Harriet Rowland in using an instrument with the intent to procure her own miscarriage. There was no allegation in the indictment that appellant was with child. It appeared from the evidence that appellant visited Rowland's house, and allowed Rowland to operate on her with an instrument. The jury convicted appellant, and also found as a fact that at the time of the offence she was pregnant. Appellant appealed against the conviction on a question of law. She had been sentenced to three months' imprisonment with hard labour.

By sect. 58 of the Offences against the Person Act, 1861 (24 & 25 Vict. c. 100):—"Every woman being with child, who with intent to procure her own miscarriage, shall unlawfully administer to herself any poison or other noxious thing, or shall unlawfully use any instrument or other means whatsoever with the like intent, and whosoever with intent to procure the miscarriage of any woman, whether she be or be not with child, shall unlawfully administer to her or cause to be taken by her any poison or other noxious thing, or shall unlawfully use any instrument or other means whatsoever with the like intent, shall be guilty of felony."

1908
31 *July.*
Mary Sockett.

R. T. G. Tangye, for the appellant, who was present, said that the indictment was bad upon the face of it, as it did not allege that appellant was with child. It was clear that the indictment was bad if appellant was indicted under the first part of the section. It was also clear that she could not be indicted under the second part of the section as a principal in the second degree, when the facts showed that she was a principal of the first degree, and should be prosecuted, if at all, under the first part of the section. For it would be a very strong thing to allege that a woman is liable if she consents to an offence done by another person, for which she would not be liable if she did it with her own hand. See *Tyrrell*, [1894] 1 Q. B. 710; 63 L. J. M. C. 58; 17 Cox C. C. 716: C. C. R. The reason for the distinction in the section is that a person cannot be convicted of an offence against herself except in the cases of *mayhem* and of attempted suicide. Appellant should have been indicted for conspiracy. See *Whitechurch* (1890), 24 Q. B. D. 420; 59 L. J. M. C. 77; 16 Cox C. C. 743; 54 J. P. 472: C. C. R. It is clear that at common law a woman could not be convicted of the offence unless she was with child. See 1 Hale's Pleas of the Crown, at p. 433, and *James Scudder* (1829), 1 Moody's Crown Cases, 216; 3 C. & P. 605.

L. J. Sturge, for the Crown, was not called upon.

The Lord Chief Justice said that this woman, Sockett, was indicted under sect. 58 of the Offences against the Person Act, 1861 (24 & 25 Vict. c. 100), that she "feloniously was present aiding, abetting and assisting" another woman, Rowland, in using an instrument to procure her own miscarriage. As had been pointed out, it was not easy to see why the two offences in the section differed in one essential particular. To constitute the offence in the first part of the section the woman must be with child; the offence in the second part of the section was "whether she be or be not with child." In the indictment there was no allegation that appellant was with child, but the jury found as a fact that she was with child. It was clear that where the crime charged was that under the second part of the section, a person might do the unlawful act to a woman although the latter was not pregnant. This case raised a very simple question. There was abundant evidence of an offence under the second part of the section on the part of the woman Rowland. The jury had found

1908
31 *July*.
Mary Sockett.

that Sockett being present aided, abetted and assisted her in the commission of that offence, and had convicted her of that offence. It was said that because this woman could not have been convicted of the offence in the first part of the section without an allegation in the indictment that she was with child, that she could not be convicted of aiding and abetting the felony in the second part of the section. They saw no ground for that contention, or legal objection to the conviction. If there were any doubt as to which of the offences in sect. 58 appellant was convicted of, the Court could set the matter right under sect. 5 (2) of the Criminal Appeal Act. But it was clear that appellant was convicted of aiding and abetting the felony under the second part of the section. The distinction between principals of the first and of the second degree was not of much assistance to them. Mr. Justice Darling had drawn a very marked distinction between the cases of the two women, and sentenced Sockett to only three months' imprisonment with hard labour. There was no legal objection to this conviction.

Appeal dismissed.

BEFORE

MR. JUSTICE LAWRANCE, MR. JUSTICE RIDLEY, AND MR. JUSTICE DARLING.

1908
30 *July*.

Alfred Gerhold and William Gerhold.

ALFRED GERHOLD AND WILLIAM GERHOLD.

Fresh evidence—Bail.

This was an appeal from a conviction at the Central Criminal Court after a trial, on June 27th and 29th, before the Common Serjeant. Appellants were indicted for (1) feloniously forging and uttering a certain accountable receipt for goods with intent to cheat and defraud; (2) wilful and corrupt perjury; and (3) conspiring and agreeing together, by means of a forged accountable receipt for goods, and certain false and perjured testimony, to defeat the ends of justice. Appellants were convicted of conspiracy, and Alfred Gerhold was sentenced to nine and William Gerhold to six months' imprisonment with hard labour.

Appellants had obtained leave from Channell J. to appeal against their conviction, and on July 17th had applied in person to the full Court for leave to call further witnesses. This leave had been granted, and the Court at the same time granted them the same bail as that allowed by Channell J., which was the same as that granted by the magistrate on committal. The hearing was adjourned from July 17th to 23rd in order to enable appellants to instruct solicitor and counsel. On the 23rd the hearing stood over at appellants' request.

Appellants let a workshop to Benjamin Knowlson, a son of the prosecutrix, who brought a moulding into the workshop. To make room for this machine a similar one belonging to appellants was broken in the course of the removal. At the termination of Benjamin Knowlson's tenancy the prosecutrix demanded the return of her machine, but appellants

1908
30 *July*.
Alfred Gerhold and William Gerhold.

refused to give it up. The prosecutrix thereupon took proceedings to recover the machine in the North London Police Court, and the magistrate made an order for its immediate delivery. Subsequently, on December 17th, 1907, the prosecutrix recovered her machine and signed a receipt, which she alleged was in the following terms:—"Received my own spindle machine." She signed her name at the bottom of the paper as directed by W. Gerhold, and a considerable space was left between her signature and the words above it.

At a later date the appellants took proceedings in the County Court against the prosecutrix to recover, *inter alia*, damages for breach of agreement.

The agreement relied on was the document of December 17th, 1907, which, when produced in Court, read as follows: "Received my own spindle machine, and I agree to replace new iron frame to broken spindle and refix the spindle machine as before." It was alleged that all the words after "machine" had been written in subsequent to the signing of the receipt. The County Court judge refused to decide as to this, holding that if the document was a genuine one there was no consideration for the agreement, as appellants were obliged to deliver up the machine in pursuance of the magistrate's order. At the County Court appellants swore that Alfred Gerhold was present when the document of December 17th was signed. This was denied by the prosecutrix and other witnesses.

Louis Green, for appellants, who were present, now called and examined Sergeant Bartlett of the J. Division. He said that he knew the premises of appellants. He was called there on December 7th, 1907, when he saw Alfred Gerhold, Mrs. Knowlson and Benjamin Knowlson. They were all engaged in altercation. Mrs. Knowlson said: "I will do the repairs after you let my son move the machine." He did not understand what repairs were referred to. He heard Mrs. Knowlson say she would do the repairs. She said, "I will pay you by weekly instalments."

Muir, for the Crown, did not cross-examine.

[Darling J.: The repairs might have been repairs to the premises.]

Another witness was called, but there was no answer to his name.

1908
30 *July*.
Alfred Gerhold and William Gerhold.

DARLING J. said that the Court gave leave to these men to appeal, as they thought there would have been some evidence adduced as to how the document came to be made. The evidence that had been given before them was consistent with the story of the prosecution, and was not nearly sufficient to show that the jury had come to a wrong conclusion. The summing-up of the learned Common Serjeant was admirable, and it was impossible for them to set aside the verdict of the jury on the evidence that they had heard that day.

Appeal dismissed.

Solicitor for the Appellants—*T. W. Moore.*

Arthur Heaps.

ARTHUR HEAPS.

Maximum sentence.

This was an application for leave to appeal against a sentence of five years' penal servitude passed at Birmingham Quarter Sessions by the Recorder, on July 9th, on a conviction for unlawfully and maliciously wounding one Rea, and for unlawfully and maliciously inflicting upon one Nelson grievous bodily harm.

The evidence for the prosecution was that Rea after passing the afternoon and evening of April 6th at Nelson's home, left at about 8 p.m. As he left appellant rushed out of his house, which was next door to Nelson's, and struck Rea twice on the head with a chopper, once on the temple, and once on the left ear. When he struck he said: "Hello, I thought you was that b——— Nelson from next door." (It appeared that on April 3rd Nelson, who was a cripple, complained to Heaps of the noise he made on coming home at night, and there had been words between the two men on this subject on April 3rd and 5th.) Rea shouted for help, and a man called Pugh, a friend of Rea's, came. They wrested the chopper from appellant, who ran away. Rea was in the doctor's hands for two or three weeks, but was not permanently injured. Nelson went to bed about 10.55 p.m. on the same night, and shortly afterwards appellant, with another man, Kelly, burst into the house. Appellant had a kettle in his hand full of water and he threw it at Nelson, who was sitting up in bed. Nelson's left collar-bone was broken, and he was attended by the doctor for about three months, but was not permanently injured. The police

1908
30 *July*.

Arthur Heaps.

then came into the house and arrested appellant for the assault committed on Rea.

The case for the defence was that Rea walked into the appellant's house with a furnace-lid and threw it at him; then Pugh came in and took a hammer from the floor, and Rea seized hold of a kettle, and both aimed at appellant, and that Pugh, in using the hammer, hit Rea. Appellant and Kelly did go after 11 p.m. to Nelson's house to get their hammer and kettle, but appellant did not throw the kettle at Nelson.

The police said that when Heaps was arrested, just after the second assault, he was very drunk; he was so drunk that he could not understand the charge.

A. H. Bittleston, for the appellant, said that the sentence of five years' penal servitude was excessive. It was the maximum sentence in this case: three years' penal servitude used to be the maximum, but it was altered to five years when the Act (27 & 28 Vict. c. 47) was passed making five years the minimum period of penal servitude. When this minimum period was lowered again (by 54 & 55 Vict. c. 69) to three years, the maximum sentence for these offences was not reduced. But in practice, he submitted, the former maximum of three years' penal servitude should be reverted to. Secondly, the police evidence was that Heaps was so drunk just after the time of the second assault that he could not understand the charge. As he mistook Rea for Nelson, it was probable that he was very drunk at the time of the first assault—three hours earlier. There was only one previous sentence for assault—a sentence of one month's imprisonment.

Lawrance J. said that in this case the learned Recorder appeared to have left the case to the jury as to which of the two stories was true—that of the prosecution or that of the defence—and the jury convicted. The facts of the case seemed to be that the first assault took place at 8 p.m. There was no evidence that at this time the prisoner was drunk. Heaps was tried by one of the most experienced Recorders, who sentenced him to five years' penal servitude. They could not interfere because some people would have inflicted a lighter sentence of, say, four or three years' penal servitude. The learned Recorder evidently thought it an extraordinarily bad case.

Application refused.

BEFORE

THE LORD CHIEF JUSTICE, MR. JUSTICE DARLING, AND MR. JUSTICE PHILLIMORE.

GEORGE HOOPER.

1908
14 *August.*
George Hooper.

Frivolous appeals.

This was an appeal against a decision of Lord Alverstone C. J., refusing legal aid and leave to appeal against a sentence of five years' penal servitude passed by Mr. Justice Darling, on July 10th, at the Warwick Assizes, on convictions for stealing a watch and chain and other articles, and also a ring.

The applicant was present, and in answer to the Lord Chief Justice said that he thought the sentence was too severe.

THE LORD CHIEF JUSTICE said that there really was not the slightest ground for the appeal. They would have to consider whether something must not be done to stop frivolous appeals of this sort. In this case the appellant had pleaded guilty to stealing a watch and chain, and had been found guilty of stealing a ring. The prisoner had a singularly bad record, and there were previous convictions against him; therefore it was impossible for the Court to say the sentence was too severe.

Applications dismissed.

WARREN THOMAS.

Warren Thomas.

Frivolous appeals.

This was an appeal against a decision of the Lord Chief Justice refusing legal aid and leave to appeal against a sentence of eight months' imprisonment, with hard labour, passed by Mr. Justice Coleridge, on July 21st, at the Swansea Assizes, on three convictions for larceny. The applicant was not present.

THE LORD CHIEF JUSTICE said that it was plain, from the number of frivolous appeals of this sort, that the working of the Criminal

1908
14 *August.*
Warren Thomas.

Appeal Act, as to certain matters of procedure, would have to be considered. The Court was learning the necessity of some change in the procedure on certain of these appeals, so as to save public time and public money. This was an appeal by a man who had pleaded guilty to three indictments, on which he had been sentenced to eight months' imprisonment, with hard labour, the sentences to run concurrently. The appellant now applied for legal aid and for leave to appeal against these sentences. They had looked through the papers, and there was not the least ground for granting the applications. Perhaps the Court ought to consider whether they would not increase the sentence which had been passed.

Applications dismissed.

Daisy Lord.

DAISY LORD.

No appeal lies against sentence of death "fixed by law"—Sect. 3 (c) of the Criminal Appeal Act—Powers of the Home Secretary.

This was an application for leave to appeal against sentence of death passed by Mr. Justice Jelf on a conviction for murder of her newly-born child at the Guildford Assizes on July 20th.

The applicant was not present. It appeared that the Home Secretary had commuted the death sentence to one of penal servitude for life.

The Lord Chief Justice said that this was one of those cases in which the Home Office very properly did not allow the death penalty to be carried into effect. The Home Secretary had, of course, acted within his powers in reducing the sentence, as nothing in the Criminal Appeal Act was to affect the Crown's prerogative of mercy. Moreover, under sect. 3 (c) of that Act, the sentence being one "fixed by law," there was no appeal against it to the Court of Criminal Appeal. The Home Secretary having reduced this sentence in the exercise of his powers, the subsequent proceedings were merely the machinery for carrying into effect the commuted sentence. There was no appeal against the decision of the Home Secretary in reducing the sentence, or against any order made in consequence of that decision.

Application refused.

ALFRED ISAAC LOVETT AND HORACE WILLIAM HIPPERSON (*a*).

1908
14 *August.*
Alfred Isaac Lovett and Horace William Hipperson.

Circumstantial evidence—Onus when primâ facie *case made by prosecution —Relative severity of sentences on co-prisoners.*

Walter Stewart (under sect. 10 of the Criminal Appeal Act) for the appellants, who were present. The grounds of appeal are (1) that the verdict was against the weight of evidence, and (2) that the Recorder misdirected the jury. The girl who watched appellants in the yard says she first saw them there about 2 p.m. The appellants have sworn they first went there at 2.30 p.m. So that from 1 p.m. until some time between 2 and 2.30 p.m. this pipe might have been stolen when appellants were not in the vicinity of the yard. The girl was not watching them the whole time. They were not seen to take the piping, and no piping has been traced to them. The only evidence against them was that they were seen in the yard, and they gave a good explanation when they said they were looking for a pigeon. Witnesses for the prosecution saw a pigeon on the roof of a house in the yard.

[PHILLIMORE J.: I see that one of the men was seen to wring out the pocket of his coat. I see, also, that four men were seen in the yard. Why did not appellants call them?]

Appellants were not represented by counsel, and had only three hours in which to prepare their defence.

[DARLING J.: They wanted to call witnesses to say that they were in the yard ten minutes later than the time put by the prosecution, and yet they are not prepared to call the two men who were up the yard with them. Why should they wish to protect these men?]

It would be a hardship if the omission of appellants to call these men at the trial should prejudice them.

Secondly, the Recorder misdirected the jury when he said to them at the end of his summing-up: "On the other hand, if the prosecution has satisfied you, as it must—the onus lies upon them—reasonably satisfied you that these men were seen in the yard,

(*a*) See p. 94, above.

1908
14 *August.*
Alfred Isaac Lovett and Horace William Hipperson.

seen going round the corner—nobody else was there, the lead was taken during that time—then you are justified in coming to the conclusion that the case has been made out against the prisoners in the dock. Weigh the evidence carefully if you will, and if you come to the conclusion to your satisfaction that the prosecution have made out a *primâ facie* case, and the prisoners have not satisfactorily answered it, it is your duty to find them guilty. If you think they have given a satisfactory explanation of the loss of this lead at the time that they were there, it will be your duty to say so by a verdict of Not guilty." The last words of the Recorder suggest that the burden of proof was on appellants to give "a satisfactory explanation of the loss of the lead at the time that they were there."

[PHILLIMORE J.: Surely what is said there is subject to the preceding words, "that the prosecution have made out a *primâ facie* case." The explanation of appellants is only required if the prosecution have made out a *primâ facie* case.]

Lastly, Lovett desires to appeal against the severity of his sentence. The Recorder differentiated unfairly between Hipperson and Lovett.

Low, for the prosecution, was not called upon.

The LORD CHIEF JUSTICE said that in this case attempts had been made to retry the case over again. There were many cases in the criminal courts where the person who was alleged to have stolen property was not seen to take it away, and there were necessarily cases where persons were convicted on circumstantial evidence. The facts of this case were—taking them as favourably as possible for appellants—that the water-closet in the corner of this yard was in good order about mid-day on the day when this piping was taken from it. At 4 p.m. the piping had gone. The evidence against these two appellants was that they were about this yard for about one and a half hours—that was taking the matter as favourably as possible for the appellants. It had been said for the defence that the time of two hours could be reduced by some minutes, and that was very possible. The appellants had applied for leave to call further witnesses [see p. 94], but the persons they wanted to call were persons who knew what appellants were doing before they went into the yard. Lovett said that

1908
14 *August.*
Alfred Isaac Lovett and Horace William Hipperson.

there was a pigeon on the roof of a house in the yard which he wanted to recapture, and Hipperson was with Lovett. The girl Clarke, the witness for the prosecution, stayed to watch these two persons. There were two other men in the yard whose names the appellants had not given. The Court could not understand the reason given for the reluctance of appellants, who were called at the trial, to give the names of these men. Then there was the evidence that one of the appellants was seen wringing out the pocket of his coat, and that was accounted for by the statement that an egg was smashed in the pocket, and it had been washed at the tap. It was impossible for the Court to re-try this case. There was evidence on which the jury could come to the conclusion they did. Then, as to misdirection, the only point was whether in what the Recorder said to the jury he sufficiently set out the law. [The LORD CHIEF JUSTICE read the passage already quoted.] The sentence beginning, "If you think they have given a satisfactory explanation," if it had been by itself would have been a misleading expression. But that sentence depended upon the preceding one, where it was said that the prosecution had to make out their case, and before that the Recorder distinctly said that the *onus* was on the prosecution. They were therefore of opinion that there was no substantial misdirection in the summing-up. It was plain that the evidence given by appellants was regarded by the jury as unsatisfactory, and that they thought they were in this yard for no proper purpose. There were two other men there also, whose names they had not given. As to the sentence on Lovett, the Court could not say that it was too severe.

Appeals dismissed.

DANIEL FARRINGTON.

Daniel Farrington.

Objections to questions or answers as to character must be taken by counsel at the moment— Omissions in summing up not necessarily misdirection—Proviso to sect. 4 (1) *of the Criminal Appeal Act.*

This was an appeal (by leave of Lawrance J.) against a conviction for larceny at the North London Sessions, on July 15th, before the Deputy-Chairman. Appellant was sentenced to fourteen months' imprisonment, with hard labour. An earlier application for leave to call further evidence was ordered to be made on the hearing of the appeal. The Lord Chief Justice had granted bail.

1908
14 *August.*
Daniel Farrington.

Barrington Ward for the appellant: This appeal lay on two grounds—(1) that the verdict could not be supported having regard to the evidence; (2) that evidence of character was improperly given before verdict. The story of the prosecutor was that he was staying in London for the Pan-Anglican Congress. On the night of June 23rd, after taking his wife to the theatre, he went to the Trocadero to meet a friend, where he had a whisky and soda. Not seeing this friend he went to the "Paxton Head," a public-house almost exactly opposite the Knightsbridge Barracks, reaching the house about 12.10 a.m. There he had a second whisky and soda. He was going up to the bar for a third whisky and soda when he was jostled by appellant. When he went to the "Paxton Head" he had had a matchbox in a ticket-pocket under his coat. The prosecutor left the "Paxton Head," and whilst waiting outside the public lavatory at the top of Sloane Street for his friend, appellant came up to him and offered him a cigarette; he refused, but appellant insisted, and so he accepted the cigarette. Appellant then offered the prosecutor a match, and the prosecutor looking down saw appellant's hand on his watch and chain. This was at 1.10 a.m., and he gave appellant into custody. The gold matchbox which had been in the prosecutor's ticket-pocket was found in the rooms of appellant, and a cigarette case of the prosecutor's was also found in his possession. The prosecution contended that appellant must have stolen the matchbox when he jostled him in the "Paxton Head," but prosecutor had given no explanation as to how the appellant got possession of the cigarette case.

The prosecutor's story on the depositions was quite different. There he said that the robbery took place some distance up the Fulham Road; that he walked up and down with appellant for three-quarters of an hour arguing with him and endeavouring to get back his property; that appellant had suggested they should get into a cab and that the prosecutor should give him £5 in the morning, and that he then gave him in charge.

Appellant's story was that from 1903 to 1908 he was a soldier in the Scots Guards, and that he was now a motor car driver to a private gentleman. He was at the "Paxton Head" on the night in question with two friends. They were there at about 12.10 or 12.15 a.m. They all left at 12.30 together. He had no cigarettes upon him at all. They all

1908
14 *August.*
Daniel Farrington.

walked together to the top of Sloane Street, where there was a lavatory. There the prosecutor came up to one of his friends and said: "Have you a light for a cigarette?" Appellant said that he had. This was the first time he saw the prosecutor on that night. Appellant and the prosecutor walked some way together, when the prosecutor asked appellant for a drink, and after some hesitation appellant took the prosecutor to his rooms. When there, the prosecutor proceeded to divest himself of some of his clothes and made certain suggestions to appellant, who told the prosecutor to get out of the house, and the prosecutor then insisted on leaving with appellant the things he was subsequently charged with having stolen. Appellant said he would give the prosecutor in charge, and the prosecutor then told him all the circumstances of his private life.

[The LORD CHIEF JUSTICE: How do you know that?]

Because the prosecutor admitted in cross-examination that the statements made by the prisoner as to his private life were true. Appellant said: "I do not want your things, but go." The prosecutor would not take the things. They both went out into the street, and both summoned the police officer at once.

It is submitted that the prosecutor's story was, on the face of it, absurd. To account for the matchbox being found in appellant's room the prosecution had to allege that appellant had robbed the prosecutor of his matchbox in the public-house, had gone home to his lodgings, changed his clothes—for it was admitted he was wearing different clothes at the time he was arrested—and again met and robbed the prosecutor. It was true that a constable swore that appellant offered him a sovereign if he would let him go, but nothing was said as to this when the case was first before the magistrate. Appellant says that a shilling dropped from his pocket, and that the constable might have made a mistake.

[*Leycester*, for the Crown, pointed out that the story of the constable as to the attempt at bribery was corroborated by the inspector, who said that the constable accused appellant of offering him a bribe, and that he (appellant) made no answer.]

[The LORD CHIEF JUSTICE: Of course, a man can be quite innocent, although he offers a bribe.]

1908
14 *August.*
Daniel
Farrington.

Secondly, evidence of character was given before verdict. He (counsel) had called a witness to the character of the prisoner, and therefore the Crown was entitled to call evidence as to the character of appellant. But counsel, in asking questions as to the character of appellant, had suggested he was the associate of certain bad characters whom he named. For these suggestions there was no foundation, and he urged it was not the practice to put such questions, except upon definite information as to their truth. Further, the police-constable called had stated that appellant was an associate of blackmailers, and that he had seen him in their company. Evidence such as this as to specific facts ought not to have been admitted. The evidence ought to have been as to general reputation, and not evidence as to particular facts.

[The LORD CHIEF JUSTICE: You might have objected, and stopped the witness, but you chose to cross-examine him as to the particular facts, and what he said in cross-examination could not be separated from what he said in chief.]

Counsel now applied to call the men who were with appellant until just after 12.30 a.m. on the night in question. He had been hurriedly briefed at the trial, and on learning the importance of their evidence he had applied to the Deputy-Chairman to postpone the trial; but the Crown had resisted this application on the ground that the prosecutor lived in Wales.

Leycester, for the Crown: Appellant was brought before the magistrate on June 24th, when, as the prosecutor did not then appear, he was remanded on bail until July 1st. On June 24th appellant was represented by a solicitor, who had the opportunity of considering the case from the first—for three weeks before the trial.

The Court allowed the application.

Corporal R., of the 1st Life Guards, was then sworn. He said that he had known appellant for five years. He was with a civilian, one S., at the "Paxton Head" on the night of June 23rd. He saw the appellant there also at about 12.10 a.m., and they were there together until 12.30 a.m. The three of them stood talking outside the public-house for ten minutes, then he said "good night" to appellant and went away. He saw the prosecutor outside, but the prosecutor did not speak to him. He had seen the prosecutor inside the house before.

1908
14 *August.*
Daniel Farrington.

In cross-examination, Corporal R., when asked if he had any reason to notice the prosecutor, said he had known him before. He was walking up and down outside the public-house. He had a short light overcoat on. He had seen the prosecutor about fourteen or twenty-one days before at the same place when appellant was not with him. He had been about three times in that public-house with appellant. He had not been asked to come as a witness at the trial.

In answer to the Court he said that appellant was a friend of his, and that they both came from the same town. He had seen the prosecutor about four years ago, and about three weeks or a month ago also. He had asked him (the witness) to have a drink with him.

S. was sworn, and said that he was a footman at an address in Park Lane. He had known appellant for eight months, and had been introduced to him by the last witness. He saw R. and appellant at the "Paxton Head" at about 12.5 or 12.10 a.m. on the night of June 23rd. Appellant asked him to have a drink. He saw the prosecutor there, but only R. and appellant spoke to him. They stayed there till closing time, when they all went out. R. and he said "good night" to appellant. He turned away to his right, and as he went he heard someone call to appellant something about a cigarette. He could not say who it was. Appellant was wearing a lounge suit.

In cross-examination he said he parted from appellant at about twenty-three minutes to one. He went away with R. R. was just on his right when the man spoke. He did not see anybody speak to R. He had seen appellant three times since he was introduced to him, and he should have known his name.

Counsel said that the learned judge who tried the case had given no direction to the jury as to the omission of the police officers to speak as to a bribe at the first hearing before the magistrate, or as to the absence of explanation in the prosecutor's story as to how appellant came to be in possession of the prosecutor's cigarette case.

He cited *Rowton* (1865, L. & C. 520; 34 L. J. M. C. 57; 10 Cox C. C. 25; 11 L. T. 745).

Leycester, for the Crown: On the point as to the admission of evidence, the Court would distinguish between the question put and the answer given. The questions asked were quite properly put.

1908
14 *August.*

Daniel Farrington.

[The COURT: You need not trouble as to that.]

As to the other matters, they were all proper subjects for argument to a jury. Appellant's lodgings were quite close to the public-house, and on the evidence of R. and S. there was ample time for appellant to take the matchbox to them before he fell in with the prosecutor. The police said that it was twelve minutes' walking distance. Appellant was admitted to bail on June 27th, and could easily have made inquiries as to the few facts he knew about the prosecutor's home affairs—for example, that he was married to a woman older than himself, that he had been a bank clerk, and had married a woman with money. The prosecutor had always denied appellant's account, and the jury believed the prosecutor's account. The evidence of the police officers showed that appellant had offered a sovereign to one of them as a bribe.

The LORD CHIEF JUSTICE said that he thought the prosecutor had laid himself open to grave suspicion by the way in which he had conducted himself on this night in the company of these men. Had the case rested simply on the evidence of the prosecutor, there might have been more difficulty in dealing with the case. But they had to remember that the same points which were now urged before them had been made in speeches to the jury. Though the summing-up of the learned Deputy-Chairman might have been fuller or more helpful, there was no misdirection in it. The only complaint made by counsel was that it did not deal with certain facts in the case—a sin of omission. But summings-up were not intended to be a minute examination into all the details of the case, though in this case the summing-up might have been fuller. They had very carefully considered whether there was not a miscarriage of justice, and they had come to the conclusion that they could not interfere. The undisputed facts were that between 1 and 2 a.m. on June 24th the prosecutor charged the appellant with stealing his watch and chain, which were then in appellant's possession. It was also proved that the prosecutor's matchbox was found on the mantelpiece in appellant's room. In these circumstances the jury would have to consider carefully whether these things were lawfully in the possession of appellant. The latter had said when he was arrested that the prosecutor gave

1908
14 *August.*
Daniel
Farrington.

them to him. But if his story was true that the prosecutor had suggested the commission of an abominable offence, and had given these articles in this way to appellant, he ought to have said a great deal more—that is, had he been an honest man. Too much importance had been attached to the evidence called on the question of the *alibi*, which was not inconsistent with appellant having gone home. It was clear that he did go home to his lodgings, for when he was arrested he was not dressed as he had been in the public-house. The important question was whether the prosecutor went to appellant's lodgings with him, and that was essentially a question for the jury. Another most material piece of evidence was the offer of appellant to bribe the constable. They agreed that it would have been more satisfactory if that had been mentioned on the first occasion before the magistrate; but the matter did not rest on the evidence of the two constables only, for the inspector at the police station proved that the charge had at once been made in the presence of appellant, who had not denied it. There was no suggestion that the man had uttered a single word. He could well understand the jury not being satisfied with the story told by appellant. It might well be that the jury had attached too much importance to the statement made that appellant was an associate of blackmailers. It was said that the evidence as to character was too specific. They agreed that evidence as to the prisoner's character was admissible, and the questions asked by the learned counsel were quite proper, but they had been answered with more detail than they should have been. No objection was taken by the defending counsel—perhaps wisely—and he had cross-examined to the point. They would be very slow to allow such an objection where it had not been taken by counsel for the defence at the time. Where a prisoner was undefended the case might be different. In these circumstances they had come to the conclusion that they could not possibly interfere. They had great doubts as to whether, if they had taken a different view of the case, they would not have been bound to act under the proviso to sect. 4 (1) of the Criminal Appeal Act, 1907, by which they had power to dismiss the appeal if they were of opinion that there had been no substantial miscarriage of justice. They were aware of what counsel had urged—that the prisoner ought not to be convicted of blackmailing without that charge being made against him. But they would have great

1908
14 *August.*
Daniel
Farrington.

difficulty in saying that the possession by appellant of these goods was consistent with innocence.

Appeal dismissed.

Solicitor for the Appellant—*T. D. Dutton.*

Solicitors for the Respondent—*Smith, Rundell and Dods* (for *Morgan Bruce and Nicholas*, Pontypridd).

William
Phillips.

WILLIAM PHILLIPS.

Relative severity of sentences on co-prisoners—Previous good character.

This was an appeal against a sentence of five years' penal servitude passed by Mr. Justice Coleridge on July 17th, on a conviction at Swansea Assizes for robbery with violence.

Greenfield for the appellant (under sect. 10 of the Criminal Appeal Act, as to sentence *only*), who was present, said that two sailors, of whom the prosecutor was one, fell in with two women, who took them to a house of ill-fame, where three men—appellant, Cheek and McCarthy—assaulted and robbed him. Phillips was the landlord of the house. The three men and one of the girls were found guilty of robbery with violence. Cheek had used a brass bar in assaulting the prosecutor, and both Cheek and McCarthy had been previously convicted.

The police evidence as to Phillips after verdict was to the effect that there was nothing against him previously. He was a seaman; he served six years in the Royal Navy, and was discharged, invalided, in 1902. Since that time he had been abroad. He had been in the East London Police Force in South Africa. Since he came back he had been to sea, and was discharged on May 17th from his last ship.

Cheek was sentenced to seven years' penal servitude, and McCarthy to five years' penal servitude, and the girl to one month's hard labour.

Counsel stated that though appellant in the first instance only appealed against the sentence, he now desired to appeal against the conviction and to call further evidence.

The Court refused the application.

1908
14 *August.*
William Phillips.

Greenfield said that McCarthy had been previously convicted on several occasions and appellant had a clean record, yet both met with the same punishment for the same crime. The sentence was unusually severe for a first offence.

Ivor Bowen, for the Crown, was not called upon.

The Lord Chief Justice, after alluding to the fact that appellant had been a member of a police force, said that the effect of appellant's contention might be that McCarthy's sentence should be increased, not that Phillips's should be reduced. He saw no reason for reducing this sentence. From the report of the learned judge who tried the case, it appeared that he thought the crime was planned.

Appeal dismissed.

Solicitor for the appellant (as to conviction *only*) : *G. F. Willett*, Cardiff.

James Goulding.

JAMES GOULDING.

Corroboration in rape.

This was an appeal against a conviction on July 23rd, at Birmingham, for rape. Mr. Justice Darling had sentenced appellant to penal servitude for life.

The evidence for the prosecution was as follows :—A girl aged twenty-one, the daughter of appellant, said that at about 4 a.m. in the morning of 16th May, her father, who had been out all night, entered the house and came into the attic where she was in bed. Having kicked her clothes on to the landing and threatened her with a razor, he raped her once with his clothes on and subsequently four times in bed after he had taken his clothes off. She said that she screamed until she was too exhausted to do so any longer. The following morning she left the room first and prepared the appellant's breakfast, but took none herself. Then she went to an eating-house where she was employed. Her father accompanied her to her work, and told her not to tell anyone about what had happened. At 1 p.m., when she left her work, her father was waiting for her, and they went together to the house of an aunt. They reached there about 2 p.m., and about 2.30 she

1912
The KING
v.
JAMES
GOULDING

left, going out into the yard and over a wall at the back of the house, and making her way to the place where her mother had been staying away from home for the preceding fortnight. She complained to her mother of what her father had done, and the mother put the matter into the hands of the police. At the trial the girl said that she had once had connection with a man about three or four years ago. She also said that when she got up she put a quilt round her and fetched her clothes from the room below. She did not escape when she first got downstairs, as the door was locked and the windows nailed up. She knew where her mother was staying on Wednesday, May 15th.

Two women were called who lived in the house adjoining the prisoner's. The one who was sleeping on the night in question in the room adjoining that where the girl slept, said that she heard footsteps at some time between 4 and 5 a.m. come up the stairs in the next house and enter the adjoining room. She heard a man speak and say, "Where is your mother?" and a woman answer: "I don't know. I don't know, daddy, I don't know." The steps went out of the room and then entered it again. Then she heard the words: "Oh, don't, daddy—go down to your own bed." She did not hear any screaming, only a slight moaning, and then she went to sleep. She said she could hear the man speak through the wall "quite distinctly."

The girl's evidence as to the conversation had been as follows:—Her father had said, "Where is your mother?" She said she did not know, and he threatened, if she did not know where the mother was, to commit an offence upon her. When he came on the bed she told him not to do such a thing, and he said he would do it. He also said: Was not she as good as her mother? and that he had done one ten years, and he did not mind doing another for that. He also said that if she did not stop screaming he would cut her head off with the razor.

The other woman, who slept in the next house on the floor below, said that between 4 and 5 a.m. on the night in question she was awakened by a groaning which appeared to come from the next house from above. It continued for twenty minutes.

The police found a razor, which was the prisoner's, under the pillow of the girl's bed. The proprietress of the eating-house was called to say that she noticed the girl had been crying, and she asked her what was the matter. The girl said, "I have been

1908
14 *August.*
James
Goulding.

crying with the toothache." Later she said, "Sarah, what is your trouble; you look full of trouble and grief—whatever is the matter with you?" The girl said, "I should not like to tell you." The girl's evidence on this point was substantially to the same effect. The evidence of the doctor who examined the girl was that there were no marks of violence upon her. The hymen was absent. Her condition was consistent with her story. In cross-examination he said it was possible she had had sexual connection constantly.

At the trial appellant gave evidence. He said that he and his wife did not get on well together, and that he used to knock her about through her drinking and taking snuff. He had slept at his sister's on the night in question, and did not leave that house till 5.40 a.m., reaching his own house at about 6 a.m. He said that he had on several occasions turned his daughter out of the house for bringing men home and stopping out at night.

Appellant called his sister and two other women and his son. No one of these witnesses answered to their names.

Douglas Grierson for the appellant (under sect. 10 of the Criminal Appeal Act) applied for leave to call further evidence to prove that the windows of appellant's house were not nailed up.

The application was refused.

Grierson said that the verdict was against the weight of evidence. The girl's evidence was obviously false in part. She said that the windows were nailed up. That was false. She said that the clothes were kicked out on to the landing, and later she said that she got them from a room.

[PHILLIMORE, J.: They might have been partly on the landing and partly in the room.]

According to her own story she told her father that she did not know where her mother was, although she had known for three days. Her whole tale was horribly improbable.

Secondly, there was no proper corroboration of her story. Even if appellant was in his daughter's room he had a right to be there as he was her father. What would be corroboration where a stranger was accused of rape would not be corroboration in such a case as this. There was nothing in the evidence of the two women from the adjoining house to show that a rape was being committed.

1908
14 *August.*
James Goulding.

The woman in the adjoining room said that she could hear every word "quite distinctly," and yet she heard no screams. She did not hear six of the sentences which the girl swore had been uttered. The fact that after hearing what she says she heard, she went to sleep, showed that she did not attach much importance to what she thought was going on in the next house. He submitted that the facts showed that the appellant and his wife had quarrelled and the charge was a fabrication. As for the razor, in the words of the policeman, it was found under the pillow "where the girl said it was."

J. G. Hurst, for the Crown, was not called upon.

The Lord Chief Justice said it was unnecessary for the purposes of that case to say what was and what was not corroboration. But it was plain that if words said to have been spoken were vouched for by a person in an adjoining room, that was the strongest corroboration. It was not necessary that every fact spoken to by the girl should be corroborated. Then there was the fact that the razor spoken of was found under the pillow of the girl's bed. The learned judge who tried the case was satisfied with the verdict.

Appeal dismissed.

Isaac Green.

ISAAC GREEN.

"Recent possession"—Whether defendant has knowledge that stolen property is in his possession or not is a question for the Jury—Evidence improperly given to which neither Judge nor Jury pays attention not a ground for quashing a conviction.

This was an appeal against a conviction for receiving stolen property with guilty knowledge, at the Manchester City Sessions before the Recorder on July 23rd, 1908. Appellant was sentenced to be imprisoned for four months with hard labour.

One Allmark and the appellant were indicted respectively for stealing and receiving a bundle of calico: the former was sentenced to two months' imprisonment with hard labour. The appellant's son was also charged at the police court, but the case against him was dismissed. It appeared from the evidence that 54 bundles of calico were despatched by the prosecutors to a firm in Manchester; on July 3rd the 54 bundles of calico were placed on a lorry, but when

1908
14 *August.*
Isaac Green.

the lorry was unloaded at the firm's premises only 53 bundles were found on it. Two police-sergeants, Leahy and McClellan, were watching the premises of Green, a fent dealer, from July 1st to 3rd. On July 3rd, at 12.10 p.m., they saw Allmark enter Green's premises and come out again immediately. Green came out with him and the two conversed. Allmark then left and Green returned to his premises. Five minutes later Allmark returned with a bundle of calico and entered Green's premises. He came out again almost immediately—was arrested and taken back into Green's premises. When the two sergeants entered with Allmark they found Green and a "Jewish-looking" person there, and no one else. Leahy asked Allmark where was the bundle that had just been taken in. Allmark did not reply immediately, but Green said: "You brought nothing in here. Why do you say you brought anything in?" Leahy said: "You had better tell me where it is, for I am going to find it." Allmark then said: "It is upstairs." Leahy and Allmark then went upstairs, and Allmark pointed out a bundle which proved to be the 54th bundle missing from the lorry. Leahy said: No cloth left the shop on that day from 10 a.m. till he went in at 12.10 p.m. Two Turks, named Yeddi, called at the premises between 10 and 11 a.m. in the morning. He did not see the porter McRoy there at all. McClellan said the two Turks called at the shop shortly before 12 noon and left before Allmark came in. A porter, who might have been McRoy, came to the shop after Green and Allmark had been taken away, and received the sum of 10*d.* from Green's son. No money was found on Allmark. This was the evidence for the prosecution.

Allmark gave evidence, and said that a man at the corner of a street 300 yards from Green's premises asked him if he would do an hour's work, and jumped on a lorry and handed him the bundle, and told him to take it to Green's. The man said he would follow and give him 8*d.* In cross-examination he said the man first sent him to see if Green's premises were open. Green said to him: "Fetch it and take it upstairs." When he came with the bundle Green was there, and told him the second time to take it upstairs. He did not know a man named George Hennessy. It was then put to him that at the police court he had said he did know a man of that name. There was one man with Green when he went there.

1908
14 *August.*
Isaac Green.

Green also gave evidence, and said that for nineteen years he had been a fent dealer in Manchester. No complaint had been made against him before. When Allmark came to his shop the first time the two Turks were there. Allmark said: "Is George Hennessy here?" He said: "Not here at present; but perhaps you would like to leave a message for him." Allmark said: "I have no message for him, only somebody has sent a parcel for George Hennessy, and I want to know if I can leave it at your place." Allmark said he had got the bundle outside. He asked for a delivery note, and none being produced, he told Allmark he could not take the bundle in. Then he went back to the Turks, sold them some fents, and made out an invoice. Then he went out to look for a porter, found McRoy, brought him back, and gave him the fents to deliver. He was looking for the porter from three to five minutes. The rest of the time he was in his office, which was in the room to which the outside door gave access, but was partitioned off, and there were fents upon the counter. He never saw Green bring any bundle in. There was no "Jewish-looking" man in the place. The two Turks went out just as the police brought Allmark in. Hennessy occasionally sold goods for Green on commission. [Then certain fents were produced and shown to him, which were the subject of other charges against him that had been dismissed at the police court. The jury were directed to "wipe" this incident from their minds and subsequently stated that they had done so in coming to their verdict.]

McRoy, the porter, gave evidence to the effect that Green came out of his door and beckoned him, that he then fetched a hand-cart. The two Turks were in the shop. Having got the cart he took the fents away. Whilst there a man came and asked for "George." He could not say whether the man was Allmark. Green was out two or three minutes, but he did not hear the conversation between Green and this man. He was subsequently paid 10*d.* in presence of McClellan after Green had gone.

One of the Turks was called, but as he could not speak English, and there was no interpreter, he was not examined.

A witness was also called who gave Green a character for honesty during the last twenty years.

W. Hanbury Aggs, for the appellant, who was present: There was no evidence on which Green could be convicted. The only

1908
14 *August.*
Isaac Green.

evidence that he knew the bundle was on his premises was that of an accomplice, and there was no corroboration of his evidence. There was therefore no proper evidence that the bundle was in Green's possession. The evidence of the police-sergeants was that Allmark went into Green's premises with the bundle and came out at once, and such momentary possession must be fortified by direct evidence of guilty knowledge. This requirement would not be satisfied by the uncorroborated evidence of an alleged accomplice. There was admittedly a partition round Green's office, and fents on the counter. The bundle was found upstairs. No money was found on Allmark. His suggestion was that Allmark, failing to obtain Green's permission, took the bundle upstairs without Green seeing him.

Gilbert Jordan, for the Crown, was directed to confine himself to the question of guilty knowledge. The bundle was found in Green's possession, and the bundle was recently stolen. The *onus*, therefore, lay on Green to prove he did not know it was stolen. This he had tried to do, but the jury disbelieved him. There was a conflict of evidence between the police and Green as to the taking away of the prints said to have been sold to the Turks.

[PHILLIMORE J.: Is not the first point whether the bundle was in Green's possession with his knowledge?]

There was evidence of that. The bundle was a large bundle. It must have been carried through the room where Green was, even if he was in the office partitioned off. There was also the earlier conversation with Allmark. All these facts corroborate Allmark's evidence that Green saw the bundle come in.

DARLING J. delivered the judgment of the Court. Allmark and Green were indicted, Allmark for stealing and Green for receiving a bundle of cloth. If the bundle was traced to Green's possession, then it lay on Green to convince the jury that he did not know that it was stolen. The Court thinks that there was evidence that the bundle got into Green's possession; it certainly got into his house. The jury might well decide that he knew the bundle was in his possession. Then Green gave his account of the matter; he went into the witness box. His account was very different from that given by Allmark. But the jury did not believe either of

1908
14 *August.*
Isaac Green.

them—Allmark or Green. This gets rid of a great deal of the point made by counsel for appellant, that Green was convicted on the uncorroborated evidence of an accomplice. In the opinion of the Court the learned Recorder did not misdirect the jury, or direct them on the law in a way contrary to that just stated. As to the incident of a previous prosecution, a slip to which neither judge nor jury pays attention cannot be a ground for setting aside a conviction. In these circumstances the Court thinks there is no ground for saying that there was no evidence on which the jury could convict, or that they were in any way misdirected.

Appeal dismissed.

Solicitors for the Appellant: *Cobbett, Wheeler and Cobbett, Manchester.*

BEFORE

THE LORD CHIEF JUSTICE, MR. JUSTICE DARLING, AND MR. JUSTICE PHILLIMORE.

SAMUEL WINKWORTH.

Fresh Evidence—No defence disclosed before magistrates—The Court will not, as a rule, hear witnesses who ought to, and could, have been called at the trial.

1908
18 *September.*
Samuel Winkworth.

This was an appeal from an order of Lord Alverstone C.J., refusing leave to appeal against a conviction, and an application for leave to call further evidence.

Appellant was convicted at Glamorgan Assizes before Mr. Justice Coleridge, on July 20th, of an indecent assault upon a girl nine years old, and was sentenced to twelve months' hard labour.

Bowen Rowlands, for appellant (to whom the Lord Chief Justice had granted legal aid), said that the story of the little girl was that she was sent to the post, and she met a man at dusk, who took her away with him and assaulted her. She also said that she was away with him for about two hours. The story of the little girl was almost entirely disproved by the medical evidence. The question at issue was whether the man who took the girl away was appellant. The girl had stated that the man wore a light overcoat. She was confronted with nine men, of whom appellant alone was wearing a light overcoat, and of course she picked him out. The only other evidence of identification was that of a boy, who said he saw appellant and the girl together. This evidence of identification was very slight indeed.

[THE LORD CHIEF JUSTICE: The boy swore he saw them together.]

The answer of appellant had always been that he was never with the little girl on the night in question, and had never seen her before she identified him—an *alibi*, in fact. He gave a detailed story as to his movements on that evening, and asked the police to interview certain witnesses and bring them to the

1908
18 *September.*
Samuel Winkworth

trial to prove his *alibi*. The police said that they were not asked to fetch these witnesses until the prisoner was committed for trial. Appellant says that they were asked earlier. But at all events he set up an *alibi* early in the proceedings and gave the names of his witnesses.

[The Lord Chief Justice: He gave the names of four witnesses, no one of whom came forward to support him. One of the names he now gives he did not give before the trial.]

Counsel said that he now wished to call two witnesses—Dunscombe and Hughes—both of whom supported appellant's *alibi*. Dunscombe had already been called; he bore out appellant's story to some extent and Hughes to a very considerable extent. Coleridge J. had stated in his summing-up that had there been any witnesses favourable to appellant, doubtless they would have been called. This was not the case and amounted to misdirection. He submitted that the affidavits sworn by the fresh witnesses he proposed to call were inconsistent with the story of the prosecution on which appellant had been convicted.

The Lord Chief Justice said that in this case, when it first came before him, there were suggestions made that the appellant could prove an *alibi*. At that time, though he refused leave to appeal, he thought appellant should have legal aid. He also thought that it was one of that class of case where the identification is all-important, and that further inquiries should be made Had he known then what he knew now, he should not have granted legal aid. The circumstances of the case were somewhat peculiar, and illustrated what he had had occasion to point out before—that the Court of Criminal Appeal did not sit to try again cases on grounds which either were or ought to have been, but were not, set up at the trial. Before the magistrates appellant had set up no defence, and in this class of case it was most important that the defence should be raised at the earliest opportunity. But at the trial appellant had set up this *alibi*, and he had previously given the names of four persons who, he said, could prove that he was elsewhere when the offence was said to have been committed, and he made charges against the police broadcast for not doing what he had asked. What Mr. Justice Coleridge said was perfectly true, namely, that if these witnesses could have

supported appellant's statement they would have been present at the trial. They were not present. Appellant had not given the name of Dunscombe as a witness; but the police had found him out. The names of the other persons appellant now wished to call were not then put forward by him. With regard to the boy whose evidence had been criticised, he (Lord Alverstone) had seen Mr. Justice Coleridge, who repeated that the boy had given his evidence extremely well. There was, therefore, no ground for allowing further evidence or for interfering with the conviction.

1908
18 *September.*
Samuel Winkworth.

Applications dismissed.

THOMAS PETERS.

Severity of sentence on first conviction.

This was an appeal against an order of Mr. Justice Darling refusing leave to appeal against a sentence of five years' penal servitude imposed on August 8th by the Chairman of the Middlesex Sessions on a conviction for inflicting grievous bodily harm, and refusing legal aid.

Thomas Peters.

The appellant said that this was the first conviction against him for an offence of this kind; he had been a teetotaler for many years, but had taken drink on the occasion in question.

The Lord Chief Justice said that this was an appeal against a sentence of five years' penal servitude, and the circumstances of the case were very peculiar. He expressed no opinion as to what would be the result of the appeal when it was heard. Leave to appeal must be given and legal aid granted.

Applications granted.

HENRY JOYCE.

Question of law in summing-up.

This was an appeal from an order of Mr. Justice Darling refusing leave to appeal against a conviction, and refusing legal aid. Appellant also applied for leave to call further evidence.

Henry Joyce.

Appellant, who was present, had been convicted on August 8th

1908
18 *September.*
Henry Joyce.

of larceny before the Deputy-Chairman of the Middlesex Sessions, and sentenced to twelve months' hard labour.

The Lord Chief Justice said that the Court had read the papers in this case, and thought that some question of law did arise on the summing-up. Leave to appeal, therefore, would be given, and legal aid granted—counsel and solicitor. There was a certain statement in the papers as to third parties to which the attention of the prosecution should be called.

Applications granted.

JOHN MACK.

Defendant setting up alibi *not giving evidence—Degrees of mistake in summing-up.*

John Mack.

Appellant had been convicted on August 8th at Middlesex Sessions of breaking and entering a dwelling-house, and had been sentenced by the Chairman to six years' penal servitude and three years' police supervision. There was a previous conviction for housebreaking. A co-prisoner, who pleaded guilty, had been sentenced to ten years' penal servitude and four years' police supervision.

Curtis Bennett, for the appellant (who was present), whose applications for leave to appeal against conviction and for legal aid had been refused by Mr. Justice Darling, now also applied for leave to call further evidence (one fresh witness being the co-prisoner). At the trial, when appellant was undefended, the defence was an *alibi:* three witnesses were called in support of it, but the other prisoner and appellant's employers had not been called. Counsel complained that the jury had been told in the summing-up that a description of appellant written down as a memorandum by a witness at the time of the crime—which was not evidence—agreed with the oral evidence given by that witness; further, the learned Chairman did not invite the defendant to go into the box, and told the jury that he never did ask prisoners to do so—[the Lord Chief Justice: I always do. Ridley J.: And I.] —yet he added that as he did not go into the box but called three witnesses, he was evidently "a person of experience and judgment in the conduct of a case." This was tantamount to informing the jury that he had been previously convicted, and on this ground

1908
18 *September.*
John Mack.

alone the conviction ought to be quashed. Here the whole question was whether the jury believed the witness in question and his wife or the *alibi*, and such a summing-up must have influenced them unfairly. Moreover, the judge said the *alibi* must fail unless defendant called the man who was admittedly with him on the night in question, but appellant being undefended did not know he could call a co-prisoner.

The Lord Chief Justice said that the Court did not altogether agree with some of the observations made by the learned Chairman; but his reference to a witness's memorandum was not a substantial misdirection, nor did his language about appellant's experience of criminal proceedings justify the Court in quashing the conviction. There was strong affirmative evidence of appellant's presence when the crime was committed, and his *alibi* broke down. A prisoner who sets up an *alibi* and does not go into the box cannot ordinarily expect a new trial to be granted.

Solicitor for the Appellant: *T. Freke Palmer.*

Applications dismissed.

LEONARD OSBORNE.

Leave to appeal granted in view of questions put at the trial.

Leonard Osborne.

This was an appeal against an order of Mr. Justice Darling refusing leave to appeal against a conviction, and refusing legal aid. Appellant also applied for leave to call further evidence.

Appellant had been convicted of larceny on August 13th at North London Sessions before Mr. Hedderwick, Acting Deputy-Chairman, and sentenced to twelve months' hard labour.

Appellant, in person, said that he was not guilty of the offence. The case was one of mistaken identity, and the identification had not been fair.

[The Lord Chief Justice: What witnesses do you wish to call?]

Appellant: McGuire, the man who was convicted.

1908
18 *September.*
Leonard Osborne.

The Lord Chief Justice said that in this case he thought leave to appeal should be given, having regard to some of the questions put at the trial. The prosecution should be ready to give information as to the house, and, if possible, the Court should be furnished with a plan.

Applications granted.

JAMES OSBORNE.

Proving a previous conviction under sect. 7 of the Prevention of Crimes Act, 1871 (34 & 35 Vict. c. 112).

James Osborne.

This was an application for leave to appeal against a conviction and for legal aid, which had been referred to the full Court by Mr. Justice Darling.

Appellant had been convicted of being in a dwelling-house for an unlawful purpose, at North London Sessions, before the Deputy-Chairman on August 25, and sentenced to twelve months' hard labour.

Appellant, in person, said that he was a "likely" person to be charged under the Prevention of Crimes Act, but he could call two persons to prove an *alibi* when this offence was committed.

The Lord Chief Justice said that the Court could not grant leave to appeal on the grounds upon which they had been addressed. But Darling J. had referred the case to the full Court on another point. It seemed, however, clear, from the decision in *Penfold*, [1902] 1 K. B. 547; 86 L. T. 204; 50 W. R. 671; 66 J. P. 248; 20 Cox C. C. 161 (C. C. R.), overruling *Brown* (1901), 65 J. P. 136, that on an indictment charging a prisoner with an offence under sect. 7 of the Prevention of Crimes Act, 1871, the previous conviction was a necessary ingredient of the offence, and might be given in evidence before the jury in the first instance. Notwithstanding sect. 9 of that Act, when sect. 20 was considered, the law was quite clear.

Applications dismissed.

HARRY KEY.

1908
18 *September.*
Harry Key.

Sect. 4 (1*a*) *of the Post Office* (*Protection*) *Act*, 1884 (47 & 48 *Vict. c.* 76)—"*Indecency*" *a question of fact for the jury—If the defence gives evidence of a previous prosecution, the judge is entitled to ask whether it resulted in a conviction.*

Agency in criminal law.

This was an appeal against a conviction at the Birmingham Assizes, before Mr. Justice Darling, on July 21st, 1908. Appellant, who was sentenced to twelve months' imprisonment without hard labour, and was on bail, also applied for leave to call further evidence.

The conviction was on two counts of an indictment for unlawfully sending postal packets which enclosed an obscene book, to wit, an illustrated circular or price list of medical, surgical and rubber appliances, and certain indecent articles (specified).

Vachell, K.C. (with whom was *H. H. Maddocks*), for the appellant, said that his client was a member of a firm of vendors of surgical and other appliances. In June, 1908, this business was still in existence, and it was said by the prosecution to be then carried on by the defendant. But it appeared that the business was in fact carried on by four brothers, of whom the defendant was one. The responsible manager of the shop was one Dennis, and there were two assistants. The firm traded as Curtis & Co., at an address in Birmingham. An inspector of police wrote for the articles mentioned in the first count of the indictment ("articles A."), and received them, with a circular and price list. From this list he ordered articles the subject of the second count ("articles B."). These also he received in a postal packet. The inspector sent postal orders with both his letters, and received the two postal packets in reply at the General Post Office, Wolverhampton, from which place he wrote for them. On June 20th the appellant claimed a bicycle at a police station which had been ridden by a man arrested on a charge of posting indecent bills of Curtis & Co. This man stated, in appellant's presence, that he had been employed by appellant. On June 24th the premises of Curtis & Co. were searched under a search warrant. Articles "A." were found on the premises, but no circular identical with the one sent to the inspector, though price lists

1908
18 *September.*
Harry Key.

of a more inoffensive character were found. A certain number of articles "B." were also found.

Appellant's case was that Dennis had authority to sell "usual articles A.," but that he had no authority to send the circular or to sell articles "B." At the trial counsel had submitted that there was no case to go to the jury, but this contention had been overruled. Appellant had then gone into the box and had sworn that Dennis not only had no authority to send the circular or to sell the articles "B.," but had been expressly forbidden to do so. Dennis also gave evidence corroborating this, and stating that the circular sent was a single one found among some old stuff, and left over from a time when the firm did deal in articles "B." As to these articles found on the premises, they had been put aside in a box upstairs some time ago, when the premises had been raided by the police, and the firm had undertaken not to deal in those goods; they had not been removed because there was some dispute with the manufacturers, and the firm wanted the manufacturers to take them back. Dennis said that he had put the money he received for these goods into his own pocket, and appellant had no knowledge as to either of the two orders, and was not in Birmingham at the dates when the goods were sent out. Indeed, this is partly an application to call evidence that he was away. There was therefore no evidence that Dennis had authority to send the list or sell articles "B." Dennis in fact cashed both the postal orders.

[The LORD CHIEF JUSTICE: Do you say that the jury could not consider these articles mentioned in the second count which were stored on the premises? Suppose the jury did not believe Dennis's story, must the Court say appellant is not guilty?]

Yes; his authority was only to carry on the business in the ordinary way; the defence was that these goods were put aside and were not to be touched; they were to be sent back to the manufacturers. Neither defendant nor Dennis supplied the deficiency of the case for the prosecution, and if there was no case to go to the jury, though the jury disbelieved these witnesses, that would not supply the gap.

[Mr. JUSTICE DARLING pointed out that there had been a police raid upon the premises in July, 1907, and Curtis & Co. had

1908
18 *September.*
Harry Key.

promised the authorities not to carry on the business again of selling these articles "B." The business was closed altogether for a while, but re-opened in September, 1907.]

The evidence of appellant and Dennis was that when the business was re-opened a new price list and circular was adopted and the old objectionable printed matter destroyed. There was a package of articles "B.," but they were kept upstairs out of the way so that they could not be sold. As to articles "A." mentioned in the first count, his submission was that there was no evidence that they were "indecent" within the meaning of the section (s. 4 of the Post Office (Protection) Act). It was admitted by appellant that Dennis had his authority to send these out, but there was no evidence of "indecency" within the statute, nor did the learned judge give the jury any direction as to what the word there meant.

[Mr. Justice Darling: I told them the question whether a thing is "indecent" is one which must be considered having regard to all the circumstances of time and place. The jury had had these articles ("A.") before them, but not "B.," which were too gross to be exhibited at all. Why should the jury not convict on "A." alone?]

[The Lord Chief Justice: They were entitled to take into consideration the length of time "B." had been on the premises. Indecency was not a question of law, but of fact for the jury.]

Then there ought to have been some direction by the judge: there was no *evidence* that "A." was either indecent or obscene. It is one of the dangers of the Criminal Evidence Act, 1898, that juries are tempted to convict a defendant who has given evidence, if they do not believe him, although the prosecution has failed to prove a case against him. They were not bound to accept defendant's story that he had forbidden Dennis as to "B.," but, even then, they must have affirmative evidence. As Dennis had no authority to supply articles "B.," appellant should not have been convicted on the second count. As Cockburn C.J. said in *Holbrook* (1877), 47 L. J. Q. B. 35; 13 Cox, C. C. 650; 37 L. T. 530; 26 W. R. 144; 3 Q. B. D. at p. 63:—"You are at liberty to imply from the employment of an agent that whatever he does in the

1908
18 *September.*
Harry Key.

conduct of the business according to law has been sanctioned or authorised; but it is not, in my opinion, to be inferred that his employer has given him authority to commit crime, because he has employed him in the conduct of his business." (Counsel also referred to *Greenwood* v. *Backhouse* (1902), 66 J. P. 579; 86 L. T. 566.)

There was another ground. Appellant's counsel in his examination-in-chief asked him if he had been prosecuted for posting bills at Acock's Green. This was to show why the business was re-opened. The learned judge then asked the defendant questions which showed that he had on that occasion been convicted and fined 40*s*. This was done although the appellant had not given evidence of his own good character, and was, therefore, in contravention of the Criminal Evidence Act. It was true that appellant's counsel had opened the matter in the interest of his client, but for him it was only necessary to prove that there had been a *prosecution* (not a *conviction*). Then, again, defendant had been cross-examined as to a business he carried on in Leeds, merely to discredit him. Lastly, the sentence that was imposed was the maximum sentence of twelve months' imprisonment, though without hard labour. Counsel added that he felt some delicacy in dealing with this matter, as the learned judge who tried the case was sitting in the Court of Appeal; but having regard to all the circumstances of the case he submitted that the sentence was too severe.

J. G. Hurst, for the Crown, was not called upon to argue.

The Lord Chief Justice: The *dictum* of Cockburn C. J. which has been cited cannot be disputed. Because a crime has been committed by a servant, it does not follow that the master was liable. It was in the application of this principle that the difficulty arose. Appellant was indicted under sect. 4 of the Post Office (Protection) Act, 1884, for sending two postal packets enclosing indecent articles, the one on the 4th of June, and the other on the 9th. It was not denied that they were sent from the premises of Curtis & Co., or that they were sent out by Dennis, who was left in charge of the business carried on on those premises. It was not denied that the articles came out of the stock of Curtis & Co. Therefore, they had the ordinary trade condition of things, the manager of the business doing what under ordinary circumstances such a man would do, though appellant had suggested to the

1908
18 *September.*
Harry Key.

jury that what was done was not done with his authority. The learned judge who tried the case was asked at the end of the evidence for the prosecution to stop the case; but he refused to do so, and the Court thought that he could not have stopped the case. Then appellant was put into the box, and he said that Dennis had no authority to sell these articles ("B."), or to send out the circular. And Dennis was put into the box, and he told a very extraordinary story to confirm that told by appellant. The evidence disclosed that there were on the premises a very considerable quantity of grossly indecent things—so indecent that appellant himself said no one would touch them. He said they were only being kept to make an arrangement with the manufacturer that he should take them back. The Court thought the jury may well have altogether declined to believe the evidence of appellant. In addition to that, as was pointed out by Mr. Justice Darling, a very remarkable case was set up. It was said that the circular sent out was the only one that was left of the bundle of old circulars. When the police raided the place they did not find any other of these circulars, but they had found another kind. Appellant told the constable that he had come "too late: the stuff has gone." If it was true that this was the only circular of that kind, it was quite impossible to think that Dennis would have put it into the package which he was sending to the inspector, and the jury may well have disbelieved that story. If there were in existence on the premises more of these circulars, then they could understand why Dennis had put it in. This circular referred to the class "B." of these articles, and so the inspector got the information which enabled him to send for them. It was remarkable that there were found some 70 or 80 articles ("B.") on the premises, referred to in the circular. It could not be suggested that that Court was *bound* to say there was no authority to Dennis to send these more objectionable articles to customers. It had been urged that the Crown was not entitled to make a case out of the mere negative evidence for the defence. That was true if there was no case to go to the jury. But taking the admitted facts, there was a case to go to the jury. That being so, the admissions made by the appellant as to his business were of great importance. There was one other thing the Court desired to say: it must not be thought that the jury might not find that the articles "A." were indecent. They were articles of a

1908
18 *September.*
Harry Key.

character which might be used very improperly. It was for the jury, looking at the articles, to say whether they were "indecent" within the meaning of the section. The suggestion made with regard to the Act that it was only passed for the protection of the Post Office could not be accepted. The purpose of the Act was to prevent the Post Office being used for the dissemination of such indecent articles. Then, as to the appeal which had been made to the Court on the ground that the sentence imposed was too severe; they could not take that view, having regard to all the circumstances of the case. The offence and the story set up by appellant, which the jury did not believe, seemed to them to justify the sentence which was imposed upon him.

Appeal dismissed.

Solicitor for the Appellant: *Arthur Hall-Wright, Birmingham.*

Solicitor for the Respondents (the Birmingham Police): *J. Ernest Hill, Birmingham.*

BEFORE

THE LORD CHIEF JUSTICE, MR. JUSTICE WALTON, AND MR. JUSTICE PICKFORD.

THOMAS PETERS (*a*).

1908
16 *October.*
Thomas Peters.

Sentence—Assault—By the repeal of part of sect. 20 *of* 24 *&* 25 *Vict. c.* 100 (*Offences Against the Person Act*, 1861), *the maximum punishment is five years' penal servitude, by virtue of sect.* 1 (1) *of* 54 *&* 55 *Vict. c.* 69, *Penal Servitude Act*, 1891.

Metcalfe, for the appellant, who was present, argued that the sentence was too severe; the evidence showed that appellant was drunk at the time he committed the assault, and that, in that condition, he was incited by the bystanders. In fact, the learned Chairman had been influenced too much in his sentence by the conduct of the crowd. He had never before been convicted of a similar offence. For a long time the maximum punishment under sect. 20 of 24 & 25 Vict. c 100 (on which was framed the only count on which he was convicted), was three years' penal servitude.

Lawrie, for the Commissioner of Police, pointed out that the sentence was authorised by sect. 1 (1) of 54 & 55 Vict. c. 69. The evidence was that appellant was sober enough to know how to fight, and as to his general character, after conviction it was deposed that when he was drunk it was very difficult to take him to the station, and that he was "a pest to the neighbourhood."

The LORD CHIEF JUSTICE said that while the prisoner was convicted of a very serious assault, the sentence was undoubtedly severe, and the Court wished the point to be argued. It now appeared that appellant was not (as he had stated) a teetotaler, and that he was sober enough to know how to fight. That disposed of the suggestion that the crowd incited a drunken man. The maximum of three years' penal servitude had been repealed

(*a*) See p. 131, above.

1908
16 *October.*
Thomas Peters.

by the Statute Law Revision Act, 1892, and sect. 1 of the Penal Servitude Act, 1891, operated. As the Court had granted leave to appeal, sentence would run from the date of conviction.

Appeal dismissed: Sentence to run from date of conviction.

Henry Joyce.

HENRY JOYCE (*a*).

Misdirection—Caution to jury as to previous conviction—Confession of previous conviction not, in itself, ground for quashing.

Burnie for the appellant (who was present): The evidence was that Eglington, a carman, gave appellant a lift in his cart. The latter knew that he had money (3*l.* 8*s.*) upon him. In the course of the journey appellant suggested that Eglington should sleep while he drove for a time. Eglington lay down, and when he awoke both appellant and his money were gone. When appellant was arrested he admitted having been with Eglington, but absolutely denied having taken his money, saying, "I have no money," adding subsequently that he had 1*l.* 7*s.* 6*d.* in a cash-box at his lodgings, as turned out to be the case. At the police court he made a statement in which he said he had taken another man into the cart to give him a lift. Two substantial misdirections were complained of:—(1) In that statement appellant had incidentally referred to a previous conviction (he had, in fact, been convicted in October, 1905, of stealing his master's money, and sentenced to fourteen days' hard labour). The learned Deputy-Chairman was bound, on the authority of *John Lee's Case* in this Court (72 J. P. 253; 24 T. L. R. 627; Crim. App. Cases, p. 5, above), to caution the jury against being influenced by this.

[The Lord Chief Justice: If a man chooses to confess such a thing, it is no ground for quashing a conviction.]

He ought also to have been told that he was at liberty to go into the box (*b*); he would probably have done so. (2) In his summing-up the learned Deputy-Chairman absolutely assumed that the 1*l.* 7*s.* 6*d.* was the *remainder* of the stolen money, and

(*a*) See p. 131, above.
(*b*) Cf. p. 132, above.

1908
16 *October.*
Henry Joyce.

that appellant had meant to say so. It was obvious what the latter meant was: "I never took prosecutor's money, but I have so much of my own."

[WALTON, J.: Did the judge suggest any other view of these words than that prisoner was guilty?]

No, in effect he told the jury that he had confessed. He also told them that appellant's statement at the police court had implicated someone else, after he had told the detective he had the remainder of the money. An order of restitution of moneys found in his possession to the prosecutor had been made.

Lawrie, for the Crown, admitted that some of the language of the summing-up went beyond the facts of the case. *Lee's Case*, however, was distinguishable from this: there prisoner was a witness, here he made a voluntary statement to a magistrate.

The LORD CHIEF JUSTICE: This case brings into relief how extremely valuable the power in this Court to order a new trial would be It would naturally be rarely exercised, but without it possibly crimes go unpunished when there has been a serious misdirection. In this case, the caution to the jury should undoubtedly have been given, but the conviction would not have been quashed on this ground. The second alleged misdirection was substantial. Constables might be quite right or quite wrong in putting questions when they arrest, but here appellant should perhaps have been cautioned when he was asked, "Where have you put the money?" However that might be, the answer might mean, "I haven't got Eglington's money, but I have some of my own," and there was nothing to justify the interpretation that the 1*l.* 7*s.* 6*d.* was the residue of the prosecutor's money. At any rate, what he said was clearly compatible with an innocent construction, and that certainly should have been pointed out to the jury.

Conviction quashed: Order of restitution revoked.

Solicitor for the Appellant: *Cyril Renton.*

1908
16 *October.*

Leonard Osborne.

LEONARD OSBORNE (*a*).

Mistake in fact in summing up—Absence of plan at the trial—Fresh evidence raising grave doubt.

C. L. Attenborough, for the appellant, who was present: There was absolutely no evidence against appellant (one of three co-prisoners convicted) except that of prosecutrix whose house had been robbed between 1 and 2 in the morning, and whose story was that she had been pinned in a room upstairs by one of the prisoners convicted, and that she had seen appellant rifling her chest of drawers downstairs. This was impossible, as the plan prepared by the Treasury, now produced, showed: if such a plan had been produced to the jury, they would not have convicted. There was a good deal of evidence that only by stooping down on the landing, which was not large enough for two persons, at the top of the stairs could the chest in the room below, and then only a bit of it, be seen. Prosecutrix herself said, "I would see his back from the landing." The summing-up *assumed* that she stooped on hands and feet in this tiny space, but she had not said so.

It was too small for two people. It was clear she never saw the man at the chest properly. It was true that when he was arrested, she at once picked him out of seven or eight persons, but it was admitted that she knew him by sight and that he had visited the house (a brothel); she said on the night of the robbery at the police station that she knew one or two of the men, but till he was arrested she did not know his name.

Detective-Serjeant Vanstone was called by the Court to prove the plan he had made. He had made several such plans before. He had had the position of the chest in the house pointed out to him (as it had been moved to another house). A wooden partition ran right up through the house along the stairs; the result was, that by stooping, and only so, on the landing a bit of the chest would be seen.

P. T. Blackwell for the Crown: It could not be said this was a verdict no reasonable men could have found. Appellant had cross-examined his co-prisoners, and had gone into the box. Prose-

(*a*) See p. 133, above.

cutrix not only swore she saw him, but had picked him out. She had given a description of him, scanty indeed, but on it he was arrested. It was admitted that he knew the inside of the house, and the jury may have thought he got his knowledge on the night of the robbery.

[Pickford J. pointed out that in one passage of the summing-up the learned Deputy-Chairman spoke of her as standing up, and in another as stooping.]

In cross-examination appellant said he was at home that night, but he produced no one to confirm this. There was evidence on both sides to go to the jury.

Attenborough, in reply: If the jury had had the advantage of the plan and Vanstone's evidence, they could not have convicted. There had been an order of restitution.

Walton J.: This is a case of a larceny committed in a brothel. The appellant is a man who had frequented the brothel, and who had been twice previously convicted of stealing. It is easy to understand how the police, and also the prosecution, came to suspect him of the offence in question. But unless there was evidence upon which a jury of reasonable men could properly find him guilty, the verdict cannot stand. Plans of the house have been proved before us which were not before the jury. Upon the evidence given at the trial, and the plans and the evidence as to the house given before us, it is quite impossible to say that there was not very serious doubt as to the appellant's guilt. The probable inference from the whole of such evidence is that the prosecutrix, who was the only witness who identified him, could not see him from the position in which, according to the evidence, she was when she says she saw him. This conviction cannot stand.

Conviction quashed.
Order of restitution revoked.

Solicitors for the Appellant: *J. Westcott & Sons.*

1908
16 *October.*

James Smith.

JAMES SMITH.

Severity of Sentence—Previous Convictions.

This was an appeal, by leave of Darling J., against a sentence of five years' penal servitude inflicted by the Recorder at the Central Criminal Court on September 9th, for larceny from the person of a watch and chain, a matchbox, and a 2*l.* piece. Appellant appeared in person. He had been repeatedly convicted since 1889, and several times sentenced to penal servitude. At present he was on ticket-of-leave.

Appeal dismissed.

John Bradley, Patrick John Fleming and James Lanceley

JOHN BRADLEY, PATRICK JOHN FLEMING AND JAMES LANCELEY.

Sect. 3 of 16 & 17 Vict. c. 119 (the Betting Act, 1853)—Betting on club premises —Who are "persons using" the premises or "assisting in conducting the business"—Guilty knowledge thereof—Permission to use the premises for betting—"Sufficient localisation."

Appellants had been convicted at Liverpool Assizes, after a trial on July 25th and 27th, before Mr. Justice Bucknill, on an indictment with various counts, under sect. 3 of 16 & 17 Vict. c. 119 (the Betting Act, 1853). Bradley was only charged with "assisting in conducting the business" (under that section), and had been sentenced to pay a fine of 40*l.* The jury returned a general verdict. Fleming was fined 50*l.*, and ordered to pay costs (up to 25*l.*). Lanceley was fined 10*l.* Each was to be detained in custody till the fine was paid. The fines had been paid. There were three other co-defendants, but the case against two was withdrawn, and the third was acquitted.

In 1906 the Irvine Social Club was incorporated in Liverpool as a limited company. Fleming and Lanceley, who were bookmakers, were directors of the company and on the committee of management, of which Fleming on June 13 was chairman, and each had fifty shares; one of the acquitted men had forty-five, and four other persons, to make up the statutory seven, one each (unpaid). Bradley was a solicitor's clerk, and had helped in the

1908
16 *October.*
John Bradley, Patrick John Fleming and James Lanceley.

legal business of incorporation, and originally had acted as secretary of the company; latterly he had been auditor. He was also a member, and had proposed one member and seconded two other members of the club out of a total membership of 354. The premises consisted of one room and a lavatory, and it was not denied that they were fitted up with the ordinary appliances of a betting club—*e.g.*, a tape machine and a telephone—and that during racing hours members resorted thither for the purpose of betting, and that some made books; but it was contended for the defence that the place was a *bonâ fide* social club, where, at proper times, members had food, played cards and billiards, and read. On June 13th the police raided the club, when the usual evidences of a betting house were found, betting slips, letters and telegrams relating to bets, newspapers with racing news for the day, &c., and members were betting. Fleming and Lanceley were seated conspicuously at a table next to the tape machine, and Bradley was sitting at their side. It was not denied that the two former were making a book, and habitually used the room or table for that purpose. It was not proved that Bradley had ever been there during racing hours before, but it appeared that, as secretary, he had signed the agreement for the telephone and for the tape machine, the hire of which was 100*l.* per annum, and that the latter sum did not appear in the accounts of the company.

W. Hanbury Aggs, for Bradley. Bucknill J. said that there was no evidence in the documents of Bradley's assisting in the alleged illegal betting. On the authority, therefore, of *Cook* (1884), 13 Q. B. D. 377; 51 L. T. 21; 32 W. R. 796; 48 J. P. 694—the only case in which sect. 3 had been discussed—Bradley could not be convicted unless it was proved that the illegal betting (if any) was carried on with the permission of those who had the control of the premises (here either the limited company or the committee of the club), and that he assisted in the business of betting. His presence when the raid was made was in his capacity as auditor, and he was a member.

[Pickford J.: Did not the jury, in effect, find that this was a bogus club and that Bradley knew it?]

Knowledge of what was going on was not sufficient to convict of assisting. The door-keeper must have known, but the judge

1908
16 *October*.

John Bradley, Patrick John Fleming and James Lanceley.

directed his acquittal. There must be evidence that there was some permission by the owner, otherwise there was not "sufficient localisation," and the betting was not illegal. This appeared from the judgment in *Albert Deaville*, [1903] 1 K. B. 468; 72 L. J. K. B. 272; 88 L. T. 32; 20 Cox, C. C. 389; 67 J. P. 82; C. C. R. Bradley's duties were exclusively clerical, and at most incidental to the illegal betting; it was admitted Bradley took no part in the betting or made any profit out of it; mere knowledge would not suffice to support a conviction under sect. 3 of the Betting Act, 1853. The case ought not to have been allowed to go to the jury.

H. L. Riley, for Fleming and Lanceley. This was merely a case of a bookmaker and his clerk who would make a bet anywhere. The learned judge had not distinguished between the business of the man and the business of the place. To come within the Act there must be a business of a place, *i.e.*, a defendant must have dominion over a place different to that which he had when he made a bet anywhere else. The jury ought to have been instructed in this distinction, and to have been asked whether defendants had brought themselves within the Act. He submitted that the learned judge's direction, "If they carried on business there, that was sufficient," was wrong. It was not sufficient. See the judgment of Halsbury C., in *Powell* v. *Kempton Park Racecourse Co.*, (1899) A. C., at p. 160; 68 L. J. Q. B. 392; 19 Cox, C. C. 265; 80 L. T. 538; 63 J. P. 260:— "In one sense, every person who enters the inclosure uses it; but he does not use it in the character of owner, keeper, manager, or conductor of the business thereof. . . . There is no business being conducted by a keeper, owner, &c. in the inclosure. Each betting man is himself conducting his own business of a betting man. . . . . . His betting is in no way connected with the place, except that he, as well as other people not betting men, are there."

These defendants had the same right as any other member to be present. (He also cited *Deaville*, as above.)

[WALTON J.: A house used for betting is not necessarily an illegal betting house.]

As to clubs, *Downes* v. *Johnson* (1895, 2 Q. B. 203; 64 L. J. M. C. 238; 72 L. T. 728; 59 J. P. 487) was almost exactly this case.

1908
16 *October.*

John Bradley, Patrick John Fleming and James Lanceley.

[The LORD CHIEF JUSTICE: That was found to be a *bonâ fide* club; this was found to be a bogus club.]

There was no evidence to prove it; and the jury should have been told that a club almost exactly like this one had been pronounced legal. He told the jury to take no notice of the cases cited, but to take the law from him.

See also *Corrie and Watson* (1904), 68 J. P. 295; 20 T. L. R. 365; C. C. R. The learned judge had directed the jury that the defendants were not entitled to carry on the club for betting "except by permission of the members of the club," but there was no evidence to show that they had any such permission, or that they exercised any superior rights over other bookmakers who used the club.

[PICKFORD J.: Who were the superior authorities to give permission?]

The committee, it is submitted. The learned judge ought not to have told the jury that the club was a "bogus club" and "a blind": and he had given them no definition of "a gaming-house." The evidence in this case was quite as compatible with the club being a genuine social one as that in *Downes* v. *Johnson*. Here, in fact, there were no bets with non-members. No exclusive user of any part of the room or of the table by these defendants was proved. Because a club is used for two purposes it does not follow that one is a "blind" for the other. *Brown* v. *Patch*, (1899) 1 Q. B. 892; 19 Cox C. C. 330; 68 L. J. Q. B. 588; 63 J. P. 421; 80 L. T. 716, was not really against this contention. "Resorting thereto" in sect. 3 means localising with the object of attracting persons who otherwise would not be there. This case was a case of members genuinely using a club: lawfully there, therefore, and, being so there, betting. The business was the personal business of the peripatetic Fleming and Lanceley. (*Belton* v. *Busby*, (1899) 2 Q. B. 380; 19 Cox C. C. 392; 68 L. J. Q. B. 859; 63 J. P. 709; 81 L. T. 196.) No adverse inference should be drawn from the fact that the defendants did not go into the box. It would lead to great embarrassment if, a prosecution not having made out its case, a jury could draw an unfavourable conclusion from a defendant not giving evidence.

1908
16 *October.*
John Bradley, Patrick John Fleming and James Lanceley.

[The LORD CHIEF JUSTICE: Assuming that no *primâ facie* case was established.]

That was the submission here. Both defendants had been previously convicted of street betting, and this may have been the reason they did not go into the box. Each, moreover, had made a statement before the committing magistrate, which had been put in by the Crown.

Rigby Swift, for the respondents: In one count defendants were indicted as "occupiers" and in another as "persons using" the room; they were also charged with keeping a common gaming house. As to Bradley's knowledge, it was enough that he was answerable for the tape machine of the value of 100*l.*, and that he, the secretary and auditor, suppressed this item in the accounts of the company. Then he is found, in the raid, sitting at the table alone with the other two defendants. As to the latter, "The statute seems to be clearly directed against betting places, not against betting persons. Clearly, also, it does not forbid persons using a place by going there and meeting and betting with each other. Nor does it forbid keeping a place where persons may meet and bet with each other. Nor does it forbid carrying on the business of betting with anyone who will bet with you. But it does forbid carrying on the business of keeping an office or place to which people may come and bet with you." (*Per* Channell J. in *Brown* v. *Patch.*)

The question, therefore, is, Have these men carried on the business of keeping a place for betting with persons resorting thereto? The offence may be committed by an "owner," an "occupier," or "person using" the place. If he is proved to be "owner" or "occupier" nothing more is required to establish responsibility, but if he is a "person using" something more must be shown—viz., either the authority of "owner or occupier" (*Powell* v. *Kempton Park; Belton* v. *Busby; Deaville*, above), or actual physical possession of the place used. (*Brown* v. *Patch*, above.) The words of Channell J. (above), therefore, exactly expressed the law: "The statute seems to be clearly directed against betting places, not against betting persons."

[The LORD CHIEF JUSTICE: You only want evidence of authority when you charge some one other than the owner or the occupier, *e.g.*, the landlord, not when the defendant is himself the occupier.]

1908
16 *October.*
John Bradley, Patrick John Fleming and James Lanceley.

Standing on a box, or under an umbrella, gives the "person using" actual physical possession, and no more is required. If a space is too large—not sufficiently localised—for physical possession (*e.g.*, a public-house bar or club room), permission of a proprietor must be proved. (*Deaville*, above.) Here the physical possession of the table (though they were not indicted in respect of it) was enough, but if they used the room with the consent of the proprietors they are "persons using the same." Here the proprietors were themselves, and gave themselves permission. Even if the club was a genuine social club, its premises might be used for illegal betting, and if these two defendants were responsible for its illegal use as their betting-office, their acts were an offence under the statute. (See the judgment of Darling J. in *Corrie* v. *Watson*.) It was proved that they were there day after day. The jury stopped the prosecution and called for the defence.

Aggs, in reply: As to Bradley's knowledge, *Cook's Case* (above) is conclusive in his favour. Sect. 3 requires that he must "assist" definitely in the "business." There was no evidence that he ever made a bet, or any profit from the bookmaking.

Pickford J.: There was clearly a case to go to the jury whether, in fact, this club was a genuine social club, the members of which incidentally betted with one another, or whether the whole concern was got up especially by these three defendants as a blind for the bookmaking business carried on there by Fleming and Lanceley. At any rate, one of the purposes of the club was betting; and as it took place at special hours of the day and there were special facilities for its easy working, it was clearly, on those facts, a question for the jury whether the room was or was not being used for the purpose of Fleming and Lanceley, persons using it "betting with persons resorting thereto." Uncontradicted, the Court thought there was evidence enough for a conviction. Fleming and Lanceley held the controlling interest in the company, and were habitually there doing their business, and if permission was necessary had given it to themselves. Bradley took part in the formation of the club, and as secretary and auditor in its management, was present at the table with Fleming and Lanceley when the raid was made. His presence on that occasion might have been capable of explanation, but none was forthcoming. Could he be sitting at that table without

1908
16 *October.*

John Bradley, Patrick John Fleming and James Lanceley.

knowing what was going on, and giving the sanction of his presence to the use of the premises of the club which he had helped to found, and of which he was at the moment an official? That went to the jury, and they had come to the conclusion, to which they could come, that he did know what was going on. As to misdirection, possibly there might have been fuller direction, but the contentions of appellants had been fully put to the jury, who had come to the conclusion that the club was a bogus one, and there was no sufficient reason for disturbing that finding.

Appeal dismissed.

Solicitor for the Appellants: *John Bateman*, Liverpool.
Solicitor for the Respondents: *The Town Clerk*, Liverpool.

BEFORE

THE LORD CHIEF JUSTICE, MR. JUSTICE DARLING, AND MR. JUSTICE WALTON.

JOHN RAYMENT HILLARY.

1908
30 *October.*
John Rayment Hillary.

Fresh evidence—Alleged mistakes in minor points of evidence for the prosecution.

Darby for the appellant (under sect. 10 of the Criminal Appeal Act). The Lord Chief Justice had refused leave to appeal against conviction. Appellant (who was not present) was convicted on the 2nd October at the Manchester City Sessions, before the Assistant Recorder, of obtaining on the 2nd April, 1908, from George Sheddon a banker's cheque for 50*l.* by false pretences with intent to defraud. He had been previously convicted of conspiracy. He was sentenced to twelve months' hard labour.

The verdict was against the weight of the evidence, and certain facts alleged before the jury were not properly proved. For example, an agreement between the prisoner and another party was put in without sufficient legal proof. Again, it was said that one Hinds, with whom the prisoner alleged he had dealings, either did not exist or was an *alias* for the prisoner himself, whereas an office caretaker could prove his separate existence.

[WALTON J.: That is of no importance. The substance of the case is that appellant alleged Hinds & Co. to be substantial manufacturers at Runcorn. Can that be disproved?]

No. There was evidence that he alleged that, and that it was untrue.

[The LORD CHIEF JUSTICE: There are very substantial misrepresentations here. What further evidence have you?]

1908
30 *October*.
John Rayment Hillary.

There is a bank manager, a solicitor, and the caretaker, but they cannot disprove that the prisoner made the alleged false representations, or that they were untrue.

WALTON J.: In this case there was evidence before the jury that misrepresentations were made by the prisoner to the effect that Hinds & Co. were large soap manufacturers at Runcorn who made soap for Lever Brothers. It is not suggested that the new witnesses can disprove that evidence. If the jury believed that evidence they could properly convict. They did so and we cannot interfere.

Application refused.

James Adam Gray.

JAMES ADAM GRAY.

Absence of material witnesses through adjournment not being asked for by mistake of counsel or solicitor.

Appellant had been convicted on October 15th, at the North London Sessions, before the Deputy-Chairman, of an assault on his landlord and sentenced to six months' imprisonment in the second division. He was present and stated that his wife and daughter, aged nine, were present at the time of the alleged assault and would say that he had acted in self-defence. His wife could not be called at the trial as she was awaiting her confinement. He had told his counsel that he wished to call these two persons and his solicitor had promised to instruct counsel to apply for an adjournment. He had been advised that an adjournment would be granted as a matter of course, and so did not have his daughter in Court on the day of trial. The case was, in fact, tried at once. He had been on bail up to the trial. The Lord Chief Justice had refused leave to appeal, legal aid and bail. The Court granted leave to appeal and leave to call the witnesses asked for, and made an order for legal aid. Bail in 20*l*. (self and one surety) was allowed.

Leave to appeal and other applications granted.

JOHN EDWARD DIBBLE, *alias* JOHN CORCORAN.

1908
30 *October*.

John Edward Dibble, *alias* John Corcoran.

Hostile witness—The contents of a previous statement, put in under sect. 3 of 28 & 29 Vict. c. 18, to contradict and to discredit a witness, are not evidence against the prisoner.

J. R. V. Marchant for the appellant (under sect. 10 of the Criminal Appeal Act), who was not present. Leave to appeal had been granted by the Lord Chief Justice. The appellant was indicted on 18th September, before the Recorder, at Worcester City Quarter Sessions, for burglary. He was tried along with a co-prisoner, White, against whom there was a much stronger case, and who was found guilty and sentenced to three years' penal servitude, as was appellant. Both were undefended. The evidence showed that the burglary took place on the night of the 4th—5th May, between 11.30 p.m. and 4.45 a.m., at a post office, and the proceeds of the burglary were 958 postage stamps (penny), 633 postage stamps (halfpenny), some worthless postal orders, and some money. On 20th June a man named Williams was arrested on another charge; he confessed to this burglary and made a written statement which implicated Dibble and White. White was arrested in July and also made a written statement which implicated Williams and Dibble. At the trial counsel for the prosecution opened to the jury the story of Williams and also that of White. He also mentioned the fact that Williams had made a written statement of his story. Williams, when put in the box, told a wholly different story and exonerated Dibble of all complicity. He was cross-examined as a hostile witness (under 28 & 29 Vict. c. 18, s. 3), the contents of his statement were put to him, but he said it was untrue. The grounds of appeal were that there was no satisfactory evidence against Dibble and that the jury were influenced by facts being proved which were not evidence against him. The statement of Williams was not evidence against Dibble. White, who at the trial withdrew his statement, did not say anything against Dibble, and his statement before the trial could only be evidence against himself; it was not evidence against Dibble, but doubtless the jury were influenced by it.

When these statements are disregarded, the case against Dibble, which was opened as a strong case of direct evidence, becomes a

1908
30 *October.*
John Edward Dibble, *alias* John Corcoran.

weak case of circumstantial evidence, or rather a case of strong suspicion only. The following grounds of suspicion were relied on by the prosecution :—

(1) The prisoner, a private of the Worcestershire Regiment, stationed at the Norton Barracks, which were between one mile and two miles from the scene of the burglary, was seen to leave the barracks in the company of Williams and White about 5 p.m. on the 4th May, and was again seen in their company at the barracks on the afternoon of the 5th May. The prisoner had known White some time, but falsely denied this.

(2) The prisoner was absent from barracks on the night of the burglary, and told contradictory stories to account for his absence.

(3) On the afternoon of the 5th May he gave 1*s.* 3*d.* in penny and halfpenny stamps to a fellow private to send a parcel for him to Birmingham. He could, however, have got these stamps at the canteen, and there was evidence to this effect.

(4) A few days later he gave twelve halfpenny stamps to another fellow private. His sister, however, was called at the trial, and swore that she had sent him stamps the day before.

It is submitted that these facts alone are mere grounds of suspicion, and, apart from the statements of Williams and White, which are not evidence against Dibble, there was no satisfactory evidence on which the jury could have found him guilty. The learned Recorder took that view, and cautioned the jury against putting any reliance on Williams's statement as it was not evidence at all, and on White's statement as it was not evidence against Dibble. He further told the jury that they could not safely convict Dibble. He left the case to them with great reluctance.

Coventry, for the Crown : The prosecution had opened the statement of White, and had referred in general terms to the statement of Williams as implicating appellant. The prosecution did not know that Williams would deny its truth in the witness-box. He had properly cross-examined him as a hostile witness on the statement, and the jury were entitled to give credence to the evidence of Dibble's guilt so elicited. He cited *Little* (1883), 15 Cox C. C. 319, as the only case, apparently, on sect. 3 of 28 & 29 Vict. c. 18,

1908
30 *October.*
John Edward Dibble, *alias* John Corcoran.

[The Court was of opinion that a statement so put in was mere evidence to discredit the prosecution's own witness, and could not do more than cancel the witness's asseveration of Dibble's innocence. It could not amount to positive or admissible evidence against the latter.]

Apart from the statement, there was a case of circumstantial evidence against the prisoner to go to the jury, and the jury were entitled to believe him guilty. The facts proved threw suspicion on him and cast on him the *onus* of accounting for his movements on the night of the burglary. This he had not done in a satisfactory manner, and indeed he had told such lies as entitled the jury to disbelieve his story of his movements.

Marchant, in reply: The only proper evidence against appellant was that, some hours before and some hours after the burglary, he is seen with two guilty men. Even if he was a liar, this could not help the case for the prosecution if it was incomplete.

The Lord Chief Justice: This case is undeniably one of very grave suspicion. The difficulty arose very largely through the fact that White and Dibble were tried together. The real remedy for the difficulty would be a further investigation, but the Court had no power to order a new trial. The statements of Williams and White were evidence against the latter, but not against Dibble, and it is difficult to doubt that the jury were prejudiced against Dibble by that evidence. Even the fair summing-up and grave caution of the Recorder to the jury could not prevent that from happening. Counsel for the Crown was not to be blamed for the fact that in his opening he explained Williams's statement to the jury; he could not foresee that Williams would turn round and deny every word of it. He was, moreover, quite entitled to put in Williams's previous statement of Dibble's guilt, by way of cross-examination, to discredit Williams's story in the box where he said Dibble was innocent. He was, however, mistaken in contending that the jury could rely on that statement as evidence of Dibble's guilt; on the contrary, the only evidence on that point was the witness's statement in the box that Dibble was innocent; and the production of his previous statement to the contrary could only negative that. The unfortunate admission of Williams's and White's statements, unavoidable as it was, may

1908
30 *October.*

John Edward Dibble, *alias* John Corcoran.

have prejudiced the jury; it was impossible to believe that they had no effect on their minds; it was impossible to discover whether, in their absence, the jury would have considered Dibble's guilt to be proved. They may have preferred the written statement; in that case there was no corroboration. I will say more than this; all the remaining pieces of circumstantial evidence were mere grounds of suspicion, and were not by themselves such evidence that a jury ought to have convicted upon them alone. The Court could not agree with the contention that the fact that appellant was in the company of the other two before and after the burglary shifted the *onus* on to him. The Recorder might have suggested to the prosecution that the case ought to be withdrawn against Dibble, he did suggest to the jury that it was unsafe to convict him. Prosecution and jury alike disregarded his advice. I can understand and sympathize with the reluctance of the learned Recorder to take upon himself the responsibility of withdrawing the case from the jury; but nevertheless, in his place I should have taken upon myself that responsibility. The possession of the stamps, openly dealt with as they were, was certainly not sufficient evidence to support the conviction. A conviction cannot stand on suspicion only, however grave.

Conviction quashed.

George Hill and George Lane.

GEORGE HILL AND GEORGE LANE.

Admission of evidence of previous attempt to incite to similar crime as that charged.

J. W. Jardine, for Hill (under sect. 10 of the Criminal Appeal Act): Both prisoners and a man named Littlewood were tried for larceny at the Leeds City Sessions on 1st October last. Littlewood was acquitted. Both appellants were sentenced by the Recorder to six months' hard labour. Leave to appeal had been granted by the Lord Chief Justice. Both appellants were on bail and present. All three accused persons were charged

1908
30 *October.*
George Hill and George Lane.

with stealing three bags of sugar and two bags of cement on 15th July, 1908, the property of the Aire and Calder Navigation Company. Hill was employed by the prosecuting company; Lane and Littlewood were the servants of a merchant named Langton, in Leeds; Lane was a foreman, and Littlewood a porter under his orders. Lane's employers stored their cement with the Aire and Calder Company. On 15th July, during the dinner-hour of the company's employees, Lane and Littlewood came to the company's warehouse with their employer's dray, and a delivery order for five bags of Robson's cement in Langton's bags. The dray was thereupon loaded at the van-dock in the warehouse by Hill in the presence of Condon (a witness for the prosecution, who was a porter under Hill's orders) with three bags of sugar and two bags of Robson's cement in Robson's bags, and was then driven back to Langton's stables, where it was stopped by two detectives. They uncovered the bags, and found they were not of the nature specified in the delivery order which was shown them by Lane.

It was contended on behalf of Hill that every element of suspicion had been eliminated by the evidence given in cross-examination by witnesses for the prosecution. There were admissions that though it was the rule that no goods should be delivered during the dinner-hour, the rule was at times broken. And it had been proved that there was need for haste in this particular case. The ultimate purchaser of the cement had been called to say that he was pressing his vendor (Langton) for immediate delivery. There were also admissions that Hill might be the right person to execute an order in these special circumstances.

The statements made by appellant to the detective were all capable of explanation, and had, in fact, been satisfactorily explained.

Hill's case, in substance, was not that he had made a mistake, but that he had been deliberately misled by Condon, who had told him to take the wrong bags in order to get him into trouble.

Condon was not a credible witness, and had admitted that he owed Hill a grudge for turning him out of his lodgings some time before.

The Recorder had misdirected the jury in leading them to believe that Hill's defence was "mistake." His case had always been that this was a trap prepared for him by Condon.

1908
30 *October.*
George Hill and George Lane.

The Recorder had admitted, in re-examination, evidence by Condon that about a week previously Hill had suggested to him that he should help him to steal cement which he said he intended to sell to Lane. The proceeds were to be spent in having a good time on the occasion of the King's visit on the 8th July.

The evidence was inadmissible, and no question asked in cross-examination had rendered it admissible. The witness had referred to the incident in an answer which was not a proper answer to the question asked.

It was not admissible, because it referred to a separate crime which was to be completed before the 8th July; and moreover to a crime of a different nature and quality, viz., a simple taking as contrasted with a more complex transaction involving a substitution of more valuable goods for the goods specified upon a genuine delivery order.

[The Lord Chief Justice: We think it admissible as an essential part of the same transaction; it is part of the *res gestae;* it may possibly also be evidence to show intent if it is part of a system, and tends to negative the explanation of innocent mistake —but we are less certain about that ground for admitting it.]

In any case there is not enough evidence to justify a conviction.

Coutts Trotter, for Lane: The argument for the other appellant may be adopted for this one. But if Hill is guilty, then the evidence casts doubt upon the guilt of Lane. The Recorder told the jury that if one of the prisoners was guilty, then one of the others must have been his accomplice. He practically told them to acquit Littlewood, as he was a subordinate. Now there is no more reason to think Lane guilty than Littlewood guilty; if one of the two must be guilty, it might equally well be either of them; there is no evidence to say which is guilty, and therefore both ought to be acquitted.

T. R. D. Wright, for the Crown, was not called upon.

Darling J.: Three men were accused of the theft of certain bags. One—Littlewood—was acquitted. If one was guilty, then the circumstances showed that another must have been his accomplice. There was direct testimony—that of Condon, which the Court holds to be admissible—as to Hill's guilt, and also strong

circumstantial evidence of it. Then either Lane or Littlewood must also have been guilty. Littlewood was a mere subordinate, whereas Lane's complicity was absolutely necessary to the successful accomplishment of the crime. That of itself justifies the jury, in the circumstances of the case, in believing Lane to be the guilty man. There was ample evidence, if believed by the jury, to justify a conviction.

1908
30 *October.*
George Hill and George Lane.

Appeals dismissed.

Solicitor for the Appellant Lane: *Arthur Willey*, Leeds.

GEORGE FREDERICK HITCHIN AND JOSEPH ALBERT FLEMING.

George Frederick Hitchin and Joseph Albert Fleming.

Sect. 4 of 8 & 9 Vict. c. 109 (the Gaming Act, 1845)—Sect. 3 of 16 & 17 Vict. c. 119 (the Betting Act, 1853)—Betting on club premises—Who are "persons using" the premises or "assisting in conducting the business"—Guilty knowledge thereof—Permission to use the premises for betting.

The conviction of both defendants before the Deputy-Recorder, at the Liverpool City Sessions, on 20th September, 1908, was appealed against on the ground that the evidence did not disclose any offence charged in the indictment. Hitchin was fined 100*l.* and Fleming 60*l.*; both were ordered to pay the costs of the prosecution. Two other defendants were convicted at the same time.

The facts in this case are similar to those in the case of *Bradley, Fleming and Lanceley*, reported at p. 146, above. The arguments as to "using" and "assisting in conducting" were likewise very similar to those adopted in that case.

W. Hanbury Aggs, for the appellants (under sect. 10 of the Criminal Appeal Act), who were not in custody. The first four counts of the indictment charged Hitchin with being owner or occupier of the room in question. The Deputy Recorder held that there was no evidence of ownership or occupation by Hitchin, and struck out these counts. The only two remaining counts which concerned Hitchin were the ninth, in which all the four defendants

1908
30 *October.*
George Frederick Hitchin and Joseph Albert Fleming.

were charged with keeping a common law gaming house, and the tenth count, which was as follows :—

> "The jurors . . . . do further present that" the four defendants "on the days and in the year hereinbefore mentioned did unlawfully act in conducting the business of a certain place to wit a room situate and being numbered 4 in Salisbury Street Old Swan in the City of Liverpool which said place then was a common gaming house within the meaning of the Gaming Act 1845."

This tenth count purports to charge the defendants with an offence under sect. 4 of the Gaming Act, 1845 (8 & 9 Vict. c. 109), the wording of that section being followed in the count. But sect. 4 did not make it an indictable offence to "act in conducting," because the proviso to the section only preserves the right of proceeding by indictment against "the owner or keeper, or other person having the care or management"; no doubt by sect. 17 of the Summary Jurisdiction Act, 1879, that offence might be indictable. The ninth count could not be supported because there was no evidence of "idle and evil disposed persons" resorting to the place, or that the place was a "common nuisance," both of which are necessary ingredients to sustain a charge of keeping a common law gaming house. The tenth count could not be held to charge an offence under sect. 3 of the Betting Act, 1853, the wording of that section not having been in any way followed. Even if the tenth count was good, there was no definite evidence that Hitchin had ever been to the place within the dates named in the indictment, and no amendment was asked for.

With regard to Fleming, who was further charged with "using," the prosecution, having named an owner and occupier, namely Hitchin, could only bring themselves within the principle of *Deaville* (p. 148, above) by proving the permission or knowledge of such named owner or occupier.

Keogh, for the respondents. The tenth count may be taken as charging an "assisting in conducting the business" of the "house, &c.," within sect. 3 of the Betting Act. By sect. 2 thereof any such "house, &c." is a common gaming house within the Act of 1845.

1908
30 *October.*

George Frederick Hitchin and Joseph Albert Fleming.

The LORD CHIEF JUSTICE: There was evidence to go to the jury. There was evidence that Hitchin was upon the premises for the purposes of bookmaking during the past year. There was some evidence that Fleming assisted him. Against both there was evidence of their taking part in the business; and that is sufficiently charged in the tenth count of the indictment by the words "conducting the business, &c.," to convict appellants under sect. 3 of the Act of 1853.

Appeals dismissed.

Solicitor for the Respondents: *The Town Clerk*, Liverpool.

BEFORE

Mr. JUSTICE CHANNELL, Mr. JUSTICE PHILLIMORE, AND Mr. JUSTICE WALTON.

ROBERT GULSTON.

1908
13 *November.*

Robert Gulston.

Period during which appellant is in custody before trial may be taken into account in sentence—The Court will not reduce a sentence when the prosecution is unrepresented.

This was an appeal from an order of the Lord Chief Justice refusing leave to appeal against sentence. Appellant was present. He pleaded guilty at Winchester Quarter Sessions, on October 20th, to breaking and entering and to receiving, and was sentenced by the Chairman to twelve months' hard labour. There were two previous convictions.

The Court dismissed the application, but as it seemed doubtful whether the three months during which appellant had been in custody awaiting trial had been taken into account in passing sentence, the Court allowed the sentence to date from the conviction.

The Court stated that it would not reduce a sentence when the prosecution, as in this case, was not represented.

Application refused; sentence to run from date of conviction.

GEORGE DUNTON.

George Dunton.

Verdict alleged to be a compromise—Fresh evidence—The Court must know the nature of fresh evidence proposed.

This was an appeal from an order of the Lord Chief Justice refusing leave to appeal against conviction, and an application for leave to call further evidence.

Appellant was convicted at South London Sessions on October 21st, before the Deputy-Chairman, of stealing a side of bacon, weighing 56 lbs., from a van, and was sentenced to twenty-one months' imprisonment with hard labour.

A. C. Fox-Davies for the appellant, who was not present.

The offence was alleged to have been committed in the street at 10.55 a.m. The case for the prosecution rested mainly on the evidence of a witness named Lewis, who stated that he had seen the offence committed by two men acting in concert, and that

1908
13 *November.*
George Dunton.

he had had a view of the face of the one man and the whole body of the other man, but not of his face. Lewis had identified appellant at the police-station, but he had picked out a wrong person as being the second man. The defence was an *alibi*. Appellant gave evidence at the trial, and also called a witness named Pilgrim, who stated that appellant had been in his company for some time immediately preceding 11 a.m. in a certain public-house, and that at 11 a.m. they left together and went to another public-house, both being in the same street and at some minutes' distance from the scene of the theft. Pilgrim had been previously convicted of a slight offence, but counsel did not know this when he called him. This fact was elicited at the hearing, and counsel suggested that for this reason very little weight had been given to his evidence in the Chairman's summing-up. He desired to call a fresh witness, who would corroborate Pilgrim's evidence.

[The COURT: Where there is an application to call fresh evidence, it should be shown to the Court by affidavit or otherwise that such evidence will be material.]

Counsel stated that the proposed witness would prove that appellant and Pilgrim were together in the first public-house at the alleged time of the theft. He asked, if necessary, for an adjournment in order to file an affidavit in support of the application. The jury had twice expressed themselves unable to agree on a verdict, and had finally recommended appellant to mercy. Counsel argued that the fact indicated a compromise on the part of the jury, as if they were assured that appellant was guilty there were no grounds for such recommendation.

The Court offered no opinion on the case, but granted leave to appeal and leave to call the witness in question, on the ground that the case seemed as if it might require more careful investigation than that which could be made on this application. The ground which weighed principally with the Court was the statement as to the manner in which the jury had arrived at their verdict.

Applications granted.

Solicitor for the Applicant—*W. P. W. Phillimore.*

JAMES NICHOLLS.

1908
13 *November.*
James Nicholls.

A judge in summing up is not bound to discuss the defence raised—This Court is not confined to the subject-matter of the evidence given at the trial.

Appeal against conviction of murder before Grantham J. at Norwich Assizes on October 27, 1908.

Appellant was convicted of murder of an old woman named Susan Wilson, wife of Charles Wilson, of Feltwell, Norfolk. The murder was committed about 2.30 p.m. on October 11th. Appellant was seen about that time going towards Feltwell in the direction of the Wilsons' cottage, and he was shortly after that time seen by two witnesses coming from the direction of the cottage towards a place called Magg's Farm. He was then heard to say, "Charlie Wilson is murdering his wife." On two further occasions that afternoon he said, "I believe Charlie Wilson has killed his wife." A young boy named Banham was engaged that afternoon in filling tubs on a road close by. He stated that he had seen appellant at the door of the cottage pulling the woman by the arms and also dragging her back into the house. The boy was subsequently at a different spot in the same road, from which, it was contended for appellant, that it would have been impossible to see the door of the cottage. The medical evidence called by the prosecution was to the effect that the murder had been committed in a manner that would cause great spurting of blood. Blood was found on appellant's coat and boots, but on the trousers only a little was found, on the extreme bottom edge, while on his shirt and waistcoat there were one or two drops and none on his muffler.

Gerald Dodson, for appellant (under sect. 10 of the Criminal Appeal Act), who was not present, said he could not support the notice of appeal given by appellant. It was opposed both to the defence and to the evidence. It had been prepared by appellant himself. He urged, as grounds of appeal, that the verdict was against the weight of evidence. The story of the boy Banham, particularly as to the two different spots from which he stated he had seen the appellant and the murdered woman, was inconsistent and wholly untrustworthy. The second ground was misdirection by the learned judge, inasmuch as he entirely omitted a discussion of the defence put forward from his summing-up. It was proved that appellant was constantly occupied in rabbiting and ratting, which would account for the blood. Banham's evidence was not to be trusted. A strange man had been seen by one of the witnesses for the

1908
13 *November.*
James Nicholls.

prosecution sitting on a bank near the cottage at 5 p.m. It was suggested by the defence at the trial that he was the murderer. The learned judge's summing-up did not deal with the comparative absence of blood on the prisoner's clothes or with the other points urged for the defence. Counsel said he would ask leave to call evidence to rebut the evidence of Banham.

T. Mathew (with him *Kenrick*), for the Crown, was not called upon.

CHANNELL J.: In the judgment of the Court there were slight inconsistencies in Banham's evidence, but the whole nature of it was such that it would have been far more unreasonable for the jury to reject it than to receive it notwithstanding these inconsistencies. It was almost, if not absolutely, conclusive. Besides that there was much evidence. It was true the learned judge had omitted to discuss the defence raised on behalf of appellant in his summing-up. But if he had adverted to it he might have done so unfavourably. The jury had heard the defence. The Court could not interfere on this ground unless it was of opinion that if the learned judge had not made the omission the result would and ought to have been different. The complaints of the summing-up rested on no question of law, but on an allegation of a miscarriage of justice within sect. 4, sub-sect. 1, of the Criminal Appeal Act. But on this question it has been decided that the Court may take into consideration matters outside the evidence given at the trial. The Court must take the whole circumstances into account, especially statements by appellant in his notice of appeal, just as the Court may hear fresh evidence. If the Court had had any doubt upon the evidence here it would have been entirely removed by the grounds stated in the notice of appeal.

Appeal dismissed.

Abraham George.

ABRAHAM GEORGE.

At the close of the case for the prosecution, a judge is not, in law, bound to withdraw the case from the jury if the point is not submitted to him—If prisoner elects to go on, this Court will look at the case as a whole.

Appellant was convicted at the West Riding Quarter Sessions on October 20th, 1908, on a charge of breaking and entering premises and stealing and receiving a watch, and he was sentenced by the Chairman to twelve months' imprisonment with hard

1908
13 *November.*
Abraham George.

labour. The premises had been broken into and entered on March 3rd, 1907, and the owner thereof identified the watch as his property which had been stolen from him on that occasion. On July 11th, 1908, appellant sold the watch to a witness named Parkin. He was arrested on September 26th on this charge at the prison gate on the conclusion of a sentence for sleeping out. His defence at the trial was that he had taken the watch from the mantelpiece at home; that the watch belonged to his brother, who, on being called as a witness, stated that he had bought it five years before, and was able to give its number. Appellant had made contradictory statements about it after his arrest, inasmuch as on one occasion he said it was his brother's, and on another occasion he said it was his father's.

He appealed against his conviction on the certificate of the Chairman.

Willoughby Jardine for appellant (under sect. 10 of the Criminal Appeal Act), who was present. The Chairman's summing up contained a misrepresentation of fact, inasmuch he told the jury that appellant had told the detective that he knew nothing about the watch. Moreover, he told the jury that it was for them to say whether there was a doubt about appellant's story, and asked if he had satisfied them that he had come by it honestly. The Chairman's direction threw the burden of proof on appellant. As to the receiving, possession after such an interval was of itself no evidence of guilt: *Harris* (1860), 8 Cox C. C. 333. There was no evidence of guilty knowledge. Appellant had called his brother to tell a story which the jury found to be false, but there was no evidence which fixed appellant with the knowledge of its falsity. The case ought to have been stopped. It had been opened by the prosecution wholly as one of stealing, but the direct evidence broke down completely. If prisoner had been defended, his counsel would have submitted that there was no case against him to go to the jury. As he was undefended, the Chairman himself ought to have stopped the case; his not doing so was *per se* a miscarriage of practice. Moreover, in his defence the fact of appellant's conviction for sleeping out became disclosed, and so his case was prejudiced with the jury. *Lee* (1908), 22 J. P. 233; 24 T. L. R. 627; Criminal Appeal Cases, 5, above.

Channell J.: If no submission is made, and a prisoner goes

1908
13 *November.*
Abraham George.

on to make statements which supply evidence against him, he may rightly be convicted.

On the other point, *Lee* was decided on the ground that on the whole facts there had been a miscarriage of justice. I was a member of the Court that decided it. I invariably tell the jury if a prisoner's previous conviction becomes disclosed, that they must dismiss the fact from their minds.

Coutts Trotter, for the Crown: It is true the case for the prosecution was put as one of stealing, and, as such, failed. A witness, named Taylor, was called to prove that he had seen appellant prowling around the premises at 7 p.m., but he could not say the date, so his examination-in-chief was discontinued. It is for this Court to say whether it is the duty of the judge to prevent an undefended prisoner from convicting himself.

Jardine in reply.

PHILLIMORE J.: There was evidence on which the jury might rightly find appellant guilty of dealing with the watch knowing it to have been stolen, but not evidence on which they could find him guilty of breaking and entering or stealing. The verdict will therefore be reduced to one of receiving. As we do not feel sure that the Chairman would have passed the sentence of twelve months' imprisonment for receiving, though as there were previous convictions he might have done so, it will be reduced to six months' imprisonment with hard labour, to date from to-day. We have considered the point argued before us that there was no evidence for the prosecution, and that accordingly the Chairman ought to have stopped the case. We do not think that he was bound to do so if no submission to that effect was made to him, although he might have done so on his own initiative, and probably many judges would have done so. And as the case went on, this Court is bound to look at it as it turned out as a whole.

Verdict varied: Sentence reduced.

Alexander Kirkpatrick.

ALEXANDER KIRKPATRICK.

Severity of sentence—A judge is entitled to impose a sufficient term of sentence to enable the prisoner to undergo any special treatment, e.g., *the Borstal system.*

Appellant and three co-prisoners pleaded guilty at the Hants Quarter Sessions at Winchester, on October 20th, 1908, to having

1908
13 *November.*
Alexander Kirkpatrick.

broken into a counting-house, and having stolen 2*s.* 2*d.* All four were soldiers and were convicted. An officer of their regiment was called, who stated that the regimental authority gave a very bad account of the four prisoners, and that appellant seemed to be the worst. Appellant's defaulter-sheets were handed up, but were not read in Court. He stated in his notice of appeal that his only crime in the Army was one for which he had received twenty-eight days' imprisonment.

The Chairman, in sentencing him, said: "You are twenty years of age, and can therefore be treated under the Borstal system by way of reforming you. The sentence of the Court is that you be sent to prison for twelve calendar months, and treated under the Borstal system."

Of the three other prisoners, two (who were over twenty-one years of age) were sentenced to four months' hard labour and one (who was eighteen) to one month's.

W. Blake Odgers for appellant (under sect. 10 of the Criminal Appeal Act), who had obtained leave to appeal from the Lord Chief Justice, and who was present. The sentence, compared with those passed on the other prisoners, was excessive in length. A Court ought not to impose a sentence of exceptional length because it had some special object, in this case a particular treatment under the Borstal system, in view. It might be very unfair to the prisoner, *e.g.*, if Borstal was full. The Chairman has no power to send to Borstal. He can only sentence and recommend. Moreover, at many local prisons there is power to put the Borstal system in force, if the sentence is for less than twelve months.

[PHILLIMORE J.: A judge may rightly sentence a prisoner to such a term as will keep him in prison over Christmas, if there is any special reason for that.

CHANNELL J.: I have frequently sentenced prisoners to hard labour, and then on being asked to put them in the second division, I have done so, but I have increased their sentence.]

R. S. Nolan, for the Crown, was not called on.

CHANNELL J.: We should be sorry to throw any doubt on the right and the duty of judges to give such sentence as will enable a particular treatment, which seems to be desirable, to be carried out. Such a purpose may require that the sentence shall be of

1908
13 *November.*
Alexander Kirkpatrick.

at least a certain length. We must act on the assumption that appellant will be treated under the Borstal system. If not, he can apply to the Home Secretary, and the latter will advise the Crown to reduce the sentence. Further, in that event it would be reasonable that he should be given a right to appeal to this Court, though more than the statutory ten days would have elapsed.

Appeal dismissed.

1908
14 *November.*
Thomas Alexander Syres.

THOMAS ALEXANDER SYRES.

Severity of sentence—All pending charges of a similar nature ought (as far as possible) to be taken into account by the Court in sentencing, so that one comprehensive term of imprisonment may be inflicted.

L. S. Fletcher, for the Crown: Appellant was sentenced by the Chairman at the West Kent Quarter Sessions, held at Maidstone, on October 22nd, to three years' penal servitude for obtaining goods by false pretences. Against this sentence he appealed by leave of Mr. Justice Channell. He had at some previous time had a banking account. After it was closed he perpetrated several frauds by obtaining goods from different tradespeople by passing cheques purporting to be drawn on that account. He was sentenced on April 13th, 1908, at Cambridge Borough Sessions by the Recorder to twelve months' hard labour for a similar fraud committed within the jurisdiction of that Court. On that occasion appellant admitted other instances of similar frauds committed at different places, but the two which had been committed within the jurisdiction of the West Kent Quarter Sessions were not mentioned to the Court. The learned Recorder in passing sentence said that he wished the prisoner to be enabled to start "with a clean sheet" at the end of that sentence, and it was the intention of the learned Recorder to take into consideration in that sentence the various frauds committed by appellant which had been admitted by him. At the time of the trial at Maidstone there were still two warrants out for appellant's arrest on similar charges, and ten such cases were spoken to by a detective, but the Chairman was under the impression that only one of these had been taken into consideration by the learned Recorder of Cambridge in passing sentence. Appellant was undefended at Maidstone.

[PHILLIMORE J. suggested that the sentence had been wrongly

drawn up as from the end of the twelve months instead of from the day of conviction.]

1908
14 *November.*

Thomas Alexander Syres.

Mr. JUSTICE CHANNELL said the Court had communicated with the learned Recorder of Cambridge with a view to ascertaining if in passing sentence he had meant to take into consideration the various other cases admitted by appellant, and they had received an answer from him to the effect as stated above. He said that he acted as he did in accordance with the Home Office circular. [The Court adjourned the hearing of the case for the production of this circular.] There did not appear to be any circular addressed by the Home Secretary to Judges, Recorders and Chairmen of Quarter Sessions on this subject, but there was one dated August 20th, 1896, addressed to police authorities, chief constables, and the Watch Committees of boroughs, drawing attention to the disadvantages of a prisoner being re-arrested at the prison gates on a charge similar to that for which he had just undergone sentence, committed within a different jurisdiction, and urging that wherever a prisoner was to be tried for an offence committed either before or in connection with another offence of a similar nature for which he had already been punished, the latter fact, as also any remarks made by the Court that tried the previous case, should be brought to the notice of the Court that is about to pass sentence. He approved of this suggestion. The learned Recorder of Cambridge had stated that he had asked to be informed of the other cases before passing sentence. The Chairman at Quarter Sessions did not know this, and he had sentenced the appellant to three years' penal servitude, to date from the expiration of the twelve months. The offences were all similar—all committed by passing cheques on the same supposed account, and formed part of the course of crime for which appellant had been sentenced. The last sentence, passed in ignorance of that fact, ought not to stand. The Chairman had also been influenced by the fact that appellant seemed not to have given the police such assistance as he could have given towards recovering the property obtained by these frauds. The giving such assistance might have been made a condition of the sentence at Cambridge. Taking all facts into account, the sentence would be altered to one of twelve months' hard labour, from the date of the West Kent Quarter Sessions, to run concurrently with the sentence passed at Cambridge as far

16 *November.*

1908
16 *November*
Thomas Alexander Syres.

as that had still to run. It would follow from the judgment that a judge before whom a case against a prisoner comes is entitled, with the consent of the prisoner, in passing sentence, to take into consideration other cases which he admits. And it also follows that a Court before which the prisoner is subsequently brought should take that into consideration. But the Court laid down no general rule that where a judge has taken into consideration certain cases against a prisoner, others to which his attention has not been drawn cannot be subsequently dealt with.

Sentence reduced.

1908
14 *November*.
William Rutter.

WILLIAM RUTTER.

24 & 25 *Vict.* c. 97, s. 20—"*Maliciously*"—Bonâ fide *claim of right—Imperfect shorthand note does not affect validity of trial.*

This was an appeal against conviction on the certificate of the Chairman of the Court of trial.

Appellant was convicted at the Worcester Quarter Sessions on October 20th, under sect. 20 of 24 & 25 Vict. c. 97 (Malicious Injuries to Property Act, 1861), of destroying twenty-two plum trees and a fir tree, the property of his lessor, the prosecutor, and bound over by the Chairman to come up for judgment at the next Court of Quarter Sessions, unless his conviction was quashed by this Court.

Appellant's tenancy expired on September 29th, and on the evening of the 28th he chopped down the trees. Evidence was given at the trial that they had been planted by him, and the defence was that appellant had acted in the belief that he had therefore a right to destroy the trees.

The tenancy was one of a cottage garden, and was governed by the Allotments and Cottage Gardens Compensation for Crops Act, 1887 (51 & 52 Vict. c. 26).

Carmichael, for appellant (under sect. 10 of the Criminal Appeal Act), who was not in custody, took a preliminary objection that no shorthand note had been taken of the "proceedings at the trial" (sect. 16, sub-sect. 1 of the Criminal Appeal Act), the summing-up having been omitted from the note.

[Channell J.: All the members of the Court think that the provision in sect. 16, sub-sect. 1 of the Criminal Appeal Act is merely directory.]

1908
14 *November.*
William Rutter.

The jury's verdict amounted to one of "Not guilty." They returned a verdict of "Guilty, but done in ignorance," which meant that appellant destroyed the trees believing them to be his own. The Chairman refused to take that verdict, and he summed up afresh. They then returned a verdict of guilty, with a recommendation to mercy.

[The Court read the private report by the Chairman which stated these facts, and also that he, on the jury returning the first verdict, directed them that though the prisoner might have thought that the trees were his property, yet if he destroyed them maliciously, he was guilty.]

If a jury returns a special verdict which amounts to "not guilty" the Court must accept it. Such a verdict differs from one finding a prisoner guilty of an offence different from that charged.

CHANNELL J.: That may be so if the verdict is in terms not guilty, but it is not so where the verdict is ambiguous, though in law it might amount to "not guilty."

Coventry, for the Crown: The question is one of law, not of fact. It is a question of the law of landlord and tenant. Ignorance of the law is no defence, and the cutting of the trees was an unlawful act.

[WALTON J. referred to *Twose* (1879), 14 Cox C. C. 327, where Lopes J. said: "If she set fire to the furze thinking she had a right to do so, that would not be a criminal offence."

CHANNELL J. referred to *Clemens*, [1898] 1 Q. B. 556; 67 L. J. Q. B. 482; 46 W. R. 636; 78 L. T. 594; 19 Cox C. C. 18; C. C. R., as to the meaning of "maliciously" in sect. 20 of 24 & 25 Vict. c. 97.]

Neither of these cases are cases turning on ignorance of law, but on ignorance of a private right. "Malice" is an inference to be drawn from the doing of an unlawful act: *Bromage* v. *Prosser* (1824), 6 D. & R. 296; 4 B. & C. 247; 1 C. & P. 475; 3 L. J. (O. S.) K. B. 203; 28 R. R. 241.

CHANNELL J.: There is so much doubt, owing to the imperfection of the shorthand note, whether the jury by their finding did not intend to negative malice, that the conviction must be quashed. We do not say that in such a case the prisoner might not be rightly convicted. *Conviction quashed.*

1908
14 *November.*
Jane Elizabeth Maurice.

JANE ELIZABETH MAURICE.

Severity of sentence not dependent on value of property stolen.

Appellant was sentenced on October 24th, 1908, at Middlesex Sessions by the Chairman to five years' penal servitude and two years' police supervision on a conviction for larceny of a penny, after several previous convictions for felony.

Boyd for the appellant (under sect. 10 of the Criminal Appeal Act), who appealed by leave of the Lord Chief Justice, and was present. In May, 1908, a letter was received by the Victoria Hospital, Chelsea, asking for a collecting box. It was sent without any enquiries being made. In September, appellant called at some offices in New Southgate, and collected one penny. On September 11th she was arrested on a charge of unlawful possession of the box, which at that time was found under her arm; it had been broken open, and was empty. Subsequently the charge of larceny of the penny was preferred. There was no direct evidence of the receipt of any other sum by appellant. There were several previous convictions, and there had been one previous sentence of three years' penal servitude. It was also proved (after conviction) that appellant had been carrying on a course of similar frauds for 24 years. It was submitted that as the maximum penalty for larceny after a previous conviction for felony is ten years' penal servitude (sect. 7 of Larceny Act, 1861), the punishment was excessive, inasmuch as there was no evidence of any other sum than the penny having been stolen by appellant. Appellant might have been more adequately dealt with under sect. 4 and sect. 5 of the Vagrants Act, 1824, whereby there is power to treat persons guilty of similar conduct as incorrigible rogues. The maximum penalty in such cases is one year's imprisonment. If the object of the sentence was to keep her under the observation of the authorities for a long period, a longer term of police supervision (seven years by sect. 8 of the Prevention of Crimes Act, 1871) and a shorter one of imprisonment might have been ordered. The sentence of five years was excessive for the offence.

[PHILLIMORE J. was of opinion that sects. 4 and 5 apply to cases of people collecting alms *for themselves* under any kind of false pretence. Police supervision is not effective in such a case, as for this kind of fraud the offender would frequent not low, but respectable, neighbourhoods.

1908
14 *November.*
Jane Elizabeth Maurice.

CHANNELL J.: The offence charged here is that, having obtained the money for the hospital, she stole it.]

Burnie, for the Crown, was not called upon.

CHANNELL J.: Systematic fraud extending over a long period had been proved. There had already been sentences, including some under the Vagrancy Act, in every case for frauds on charities. The amount which a prisoner has succeeded in getting is not the criterion in a case of this kind. Previous sentences had proved ineffectual, and the Chairman was entitled to pass a sentence on the principle of keeping her out of mischief for a long time. If the principle on which the Court of trial passes sentence is right, the Court will not enquire whether the sentence is one which they themselves would have thought well to pass.

Appeal dismissed.

An application that the sentence might be ordered to date from the conviction was refused, the Court stating that its general rule is to make sentences date from the appeal.

HOLLY HUNTING AND EDGAR ALLAN WARD.

Holly Hunting and Edgar Allan Ward.

Misdirection on an immaterial point of law is not a ground for quashing a conviction—County property, how laid in an indictment.

Appellants, who were on bail, were convicted on October 21st, at the Norfolk Quarter Sessions, of stealing 16½ lbs. of beef, the property of the Norfolk County Council. Ward was sentenced to two months' and Hunting, who had previously been convicted of embezzlement, to one month's hard labour. (The hearing of the appeal being adjourned from November 13th to November 14th, each defendant was liberated on entering into his own recognisance in 50*l.*) Ward was employed by a butcher named Bloomfield, who had the contract for supplying the County Lunatic Asylum at Thorpe. Hunting was a jobbing butcher. On September 23rd both men came to the asylum in Bloomfield's cart to deliver meat. The cart was weighed on the weighbridge at the gates, but there was evidence to show that the scales there were not very accurate. The meat was weighed inside at the butcher's store by an asylum official named Curtis, who made the amount of meat out at 51 st. 1 lb., for which amount Ward made out an invoice. The meat was cut up in the store by the two men, Curtis being absent at intervals while they were doing so. The

1908
14 *November.*
Holly Hunting and Edgar Allan Ward.

cart was weighed again at the gates on going out, when it appeared to weigh 5 lbs. less than it ought to have weighed. It was shortly afterwards stopped by a police officer, who found the 16½ lbs. of beef in the cart. Appellants were asked if there was anything in the cart, and Ward replied that there were only knives there. They were arrested and charged with stealing the meat. Each made statements implicating the other. At the trial Hunting gave evidence implicating Ward. When the police officer went to the asylum the meat, or some of it, had already been cooked, and there was no evidence that it had ever been re-weighed in the store, or that there was any shortage. The clerk stated in evidence that up to a margin of probably 3 st. more meat than was actually ordered would be accepted if delivered.

Ernest Wild, who had only appeared for Ward at the trial, now appeared for both appellants. First, the property was wrongly described. The indictment should not have laid it in the county council. Secondly, there was no evidence of conversion. The meat was never re-weighed, and there was no evidence that the 16½ lbs. had been taken from the 51 st. 1 lb. invoiced to the asylum. Appellants might have been taking the 16½ lbs. to deliver to another customer. The defence was that there was no evidence that these 16½ lbs. had ever left the cart. The Chairman misdirected the jury in stating to them that the pieces of meat found in the cart were part of the amount accepted by the asylum.

[CHANNELL J.: It seems as if the Chairman had confused acceptance and readiness to accept. It is a question whether he meant to say the whole of the meat in the cart became the property of the asylum, or only the meat which was in fact taken into the asylum, even if, in fact, that was a little more or less than the amount stated in the invoice. The important thing is what the jury would have understood him to say. If his direction was meant in one way, it was right; if meant in the other, it was wrong.]

Hunting's evidence at the trial would not be admissible against Ward.

[CHANNELL J. disagreed, and referred to *Hadwen*, (1902) 1 K. B. 882; 71 L. J. K. B. 581; 86 L. T. 601; 50 W. R. 589; 66 J. P. 456; 20 Cox C. C. 206, C. C. R.]

1908
14 *November.*
Holly Hunting and Edgar Allan Ward.

The property in the meat ought to have been laid in the Asylum Committee, which is a statutory body, and can sue and be sued through their clerk. (53 & 54 Vict. c. 5, ss. 169—176; Lunacy Act, 1890.)

[CHANNELL J.: That could have been amended under the Criminal Procedure Act, 1851 (14 & 15 Vict. c. 100), s. 1.]

Before conviction, but not after. *Murray*, (1906) 2 K. B. 385; 75 L. J. K. B. 593; 21 Cox C. C. 250; 70 J. P. 295; 95 L. T. 295; 22 T. L. R. 596, C. C. R.

F. K. North, for the respondents: There was the evidence of the prisoners' statements when they were stopped by the police officer that they had nothing but knives in the cart. Ward did not give evidence at the trial. He must have known how these pieces of meat came to be in the cart. The case for the defence was put so clearly to the jury by the learned counsel that whatever obscurity there was in the Chairman's direction did not matter.

CHANNELL J.: There is some difficulty in the facts, and more in what the Chairman might have been understood by the jury to mean. The Court is only allowed to give one judgment, but there can be no objection to stating that we are not agreed as to whether there was a misdirection by the Chairman or not. But if there was, the matter comes within sect. 3, sub-sect. 4, of the Criminal Appeal Act, which applies to a misdirection on an immaterial point of law. We are of opinion that there has been no miscarriage of justice. With regard to the property in the meat, by 7 Geo. 4, c. 64, s. 15, the property in county asylums was laid in the inhabitants of the county. By the Local Government Act, 1888 (51 & 52 Vict. c. 41), s. 3 (vi) and s. 64 (1), it was vested in the county council. The property was rightly laid in the indictment in the county council. The fact that sect. 176, sub-sect. 2, of the Lunacy Act, 1890, states that the Committee named in that Act might sue and be sued by their clerk, would show that they are not a corporate body capable of holding property. Otherwise the provision would have been unnecessary.

Appeals dismissed.

Solicitor for the Appellants—*Ernest Bracey, Norwich.*
Solicitors for the Respondents—*Chittock & Chittock, Norwich.*

1908
16 *November.*
James Nuttall.

JAMES NUTTALL.

Severity of sentence—When a prisoner pleads guilty, and is sentenced in view of previous convictions, the Court is readier to review the sentence.

The interval between the last and the present conviction ought to be taken into account in sentence.

Appellant pleaded guilty at the West Riding Quarter Sessions at Wakefield on October 19, 1908, to having stolen a shirt from a stall in the market-place, and was sentenced by the Chairman to eighteen months' hard labour. He appealed against this sentence by leave of Mr. Justice Channell, but was not present. He had had six previous convictions. For five of these, which were not of a grievous nature, he had received very short sentences, the last of these five convictions being for misdemeanour, on July 21, 1905. On July 26, 1907, he was sentenced to twelve months' hard labour for stealing a horse, which was the most serious crime recorded against him.

Tully-Christie appeared for the Crown.

Mr. Justice Channell: These cases of reduction of sentences give some little trouble. When there is a trial, the judge who presides at it, and has the advantage of personal observation, has a better opportunity of determining the sentence. This Court will then be reluctant to interfere with sentences which do not seem to it to be wrong in principle, though they may appear heavy to individual judges. The Lord Chief Justice has laid this canon down. But the remark does not altogether apply when a prisoner pleads guilty, though even in that case there may be some especial consideration, such as local circumstances. It is impossible to lay down an universal principle. But the Court desires, as far as possible, to standardise sentences where it has the facts before it and can judge them as well as the Court below. In this case the Chairman reports to us that he simply acted on the previous convictions. We are, therefore, in the same position to judge as he was. He has evidently increased the last sentence the prisoner suffered. If there had been a deliberate return to crime that might have been right, but here there was evidence that the prisoner was drunk when the offence was committed, and that the shirt stolen was openly exposed in the market-place. Those facts were no excuse for crime, but were elements to consider in a case of this kind. If it had not been for his previous convictions he might never have been sent for trial, but might have been dealt with summarily. The sentence was too severe, and must be reduced to six months' hard labour.

Sentence reduced.

BEFORE

MR. JUSTICE CHANNELL, MR. JUSTICE PHILLIMORE, AND MR. JUSTICE WALTON.

JOHN WILLIAM ELLWOOD.

1908
20 *November.*

John William Ellwood.

Absence of proved motive not a ground for quashing a conviction.

Application for leave to appeal referred to the full Court by Channell J.

Appellant was convicted at the Leeds Assizes, on November 12th, 1908, before Pickford J , of the murder of a man named Wilkinson in an office belonging to some mills in Bradford. The murder was committed between 2 and 2.30 p.m. on July 31st, 1908.

Evidence was produced by the prosecution of the identification by different witnesses of the prisoner as having been seen in the immediate vicinity of the office about the time in question. The motive suggested was that applicant might have believed that, at that time, Wilkinson would have cashed the cheque for the wages of the mill employees, and that he intended to rob him of the money. A suggestion was thrown out by the prosecution that applicant had made an appointment with Wilkinson for the time and place mentioned. Evidence was called to show that applicant had received a letter from Wilkinson, and in the cross-examination of applicant it was suggested to him by counsel for the prosecution that he had, on the day of the murder, telephoned to Wilkinson making an appointment with him. In his notice of appeal applicant had only referred to one witness whom he desired to call as to his whereabouts on the day in question. That witness had been called before the coroner, and it now appeared that he had been bound over to attend the trial of the murder, but the defence had not called him. The Court was of opinion that he had not been called because his evidence did not support the defence, and that there was remarkably clear evidence of identification of applicant by the witnesses for the prosecution.

1908
20 *November.*
John William Ellwood.

Geoffrey Ellis for applicant (under sect. 10 of the Criminal Appeal Act), who was not present. The main ground of the application is that no motive was proved by the prosecution. Furthermore, there was no evidence of any appointment between applicant and Wilkinson. Applicant stated in his evidence the contents of the letter which he had received from Wilkinson, and he was entitled to be believed. The questions put to him in cross-examination as to an appointment, were put for the purpose of conveying to the jury that he had made an appointment and had done what he denied having done. The learned judge did not direct the jury that as the allegations, though put, were denied, they were not to assume that there was any foundation for them. The judge admitted applicant's evidence of the contents of the letter.

[CHANNELL J.: Applicant was entitled to say that there was no evidence that there was anything in the letter except what he stated.]

CHANNELL J.: We are not here to re-try cases but to set aside a conviction if the evidence will not support it. There is here no ground alleged of misdirection in law, but only the comprehensive one of miscarriage of justice. But there was here strong evidence. It is complained that no motive was shown. There was not an absence of suggested motive, nor a proved absence of motive. Robbery was suggested. As was pointed out by the learned judge, there is a great difference between absence of proved motive and proved absence of motive. Applicant's counsel mentioned some small matter that the learned judge might perhaps have put to the jury, but there is no complaint of a substantial misdirection. The learned judge in his report sees no reason to think that the verdict was wrong.

Application refused.

1908
20 *November.*

JOHN WATKINS.

John Watkins.

If appellant is represented at the trial and his counsel deliberately refrains from calling witnesses, leave will not be granted to appeal in order that they may be called.

This was an appeal from an order of Channell J. refusing leave to appeal against a conviction, after previous convictions before the Recorder of Wolverhampton for receiving stolen property on October 24th, when he was sentenced to five years' penal servitude. The main ground of appeal was that appellant desired to call certain witnesses from Cardiff and elsewhere to prove an *alibi*, and that he had given their addresses to the police. He was defended at the trial by counsel, acting on the instructions of a solicitor, and he had told his counsel about these witnesses, but nothing had been said about them at the trial. He handed up to the Court certain letters which he had received from these witnesses, in which they declined to come to the trial unless their expenses were paid.

CHANNELL J.: It is suggested that certain witnesses might have been called. But appellant was represented by solicitor and counsel. The facts about these proposed witnesses were known to them, and they in their discretion did not apply to call them. Appellant cannot now have a second chance. As far as I could see, the letters that he has handed up were of such a kind that counsel would not be wise in acting on them. But the main point is that nothing has been discovered since, and it was not a case of a prisoner not knowing what to do, or even of his instructing counsel from the dock.

Application refused.

MARY EAST.

Mary East.

If an undefended prisoner is prejudiced by the Court of trial believing that he is defended, leave to appeal will be granted.

This was an application for leave to appeal against a conviction referred by Channell J. to the full Court.

Appellant, a married woman, was indicted on October 22nd, jointly with a man named Barron, for (1) maliciously wounding,

1908
20 *November*.
Mary East.

(2) doing grievous bodily harm to, (3) a common assault upon, one Daman. The trial took place at the North London Sessions, before the Deputy-Chairman, who sentenced her to six months' imprisonment in the second division. It was alleged that during a street affray and a fight between Barron and the prosecutor, East had run to her house for a knife, and returning, stabbed the prosecutor in the buttock. Subsequently Barron was alleged to have wounded the prosecutor with a stevedore's hook. The jury acquitted Barron on the ground that he had acted in self-defence, but found East guilty on all counts.

du Parcq for the appellant (under sect. 10 of the Criminal Appeal Act), who was not present. The appellant has stated as her grounds of appeal—"(1) that she is innocent; (2) that she had no counsel at the trial." The latter, though not in itself a reason for allowing an appeal, is especially important here as matter for consideration, because both the learned Deputy-Chairman, and (apparently) the appellant, thought, till the case for the prosecution was closed, that the counsel who defended Barron was also representing the appellant. As a fact, the learned counsel for Barron adopted a line of defence (viz., the theory of accident) which gave no assistance to the appellant, and was even prejudicial to her case. When the learned judge discovered that the appellant was not represented by counsel he recalled the prosecutor in order that the appellant might cross-examine him, and he offered to recall the other witnesses, but the prisoner did not ask to have the most important witness against her recalled, and consequently she was not cross-examined on this prisoner's behalf.

The appellant's defence throughout was a total denial of the allegation that she had used a knife upon the prosecutor at all. The only evidence that she had used a knife was that of the prosecutor and his mistress, and the latter's statement that, in "drawing" the knife, the appellant had "cut her thumb," was not borne out by the police evidence. Several witnesses called by Barron spoke to an assault upon the appellant by the prosecutor, but said nothing of having seen the appellant with a knife. There was, therefore, not enough evidence to justify the finding of the jury.

The appellant went promptly to the police to complain of the prosecutor's assault upon her, and (at the trial) put her character in issue.

1908
20 *November.*
Mary East.

The jury at first returned an ambiguous verdict which seemed to the learned Chairman to amount to one of "Not guilty" as to both prisoners, and only found appellant "Guilty" after retiring a second time.

The Court, on the ground that possibly some prejudice had been caused to the appellant through the judge's belief that she was defended, gave leave to appeal, and ordered that the appellant and the female witness for the prosecution who had not been cross-examined at the trial should be present at the hearing of the appeal.

Leave to appeal granted: appellant and one witness ordered to be in attendance.

EDWIN ASHFORD.

Edwin Ashford

Sect. 4 (1) *of the Criminal Appeal Act considered.*

Application for leave to appeal, referred to the full Court by Channell J., against a conviction at the Central Criminal Court before the Common Serjeant on October 24th, for an assault occasioning actual bodily harm to one Gamble. On October 27th, appellant was sentenced to nine months' imprisonment with hard labour.

Huntly Jenkins, for the appellant, who was present: The trial, which had extended over three days, arose out of the findings of the Royal Commission on the Metropolitan Police. Appellant was a police constable with an excellent character, and the prosecution alleged that, in order to have improper relations with a prostitute named Griffiths, whom he found in the company of Gamble, appellant had followed the latter, going off his beat two or three hundred yards, and assaulted him. It was also alleged that a police sergeant of 14 years' standing had witnessed one assault by appellant and had failed to report it; process had been sought against this sergeant, but had been refused.

The main ground for revision was that appellant had never been properly identified. Gamble and Griffiths had identified him, but the Common Serjeant had told the jury to disregard their evidence; the woman had been "moved on" by appellant. There were

1908
20 *November.*
Edwin Ashford.

other witnesses of identification, but the Minutes of Evidence taken before the Royal Commission (cited by counsel) showed that they knew the constable's number (207 H.), which was given in evidence at the Commission. There was, however, one respectable witness, Mrs. Franks, who saw a policeman assaulting someone at the place and time in question, but she could not identify either man, and did not see the sergeant. No doubt Gamble had been assaulted, and probably by a policeman.

[CHANNELL J.: Surely, if an assault by a policeman is admitted, and it was not appellant, the Royal Commission could have found out who it must have been at that time and place?]

No one else is suggested.

CHANNELL J.: The learned Common Serjeant seems to have had some doubt about this case, but thought that there was ample evidence to go to the jury, and is not dissatisfied with the verdict. It is a peculiar and remarkable case, but there are no new facts since the trial. In a civil case the House of Lords has laid down the principles on which a new trial will be granted, and in sect. 4 (1) of the Criminal Appeal Act the Legislature has deliberately adopted their exact language. We cannot say here "that on any ground there was a miscarriage of justice." The application, however, is not frivolous, and sentence is to run from the date of conviction.

Application dismissed: sentence to run from date of conviction.

Solicitor for the Appellant—*Harry Wilson.*

Thomas Knight.

THOMAS KNIGHT.

The owner of goods cannot be found guilty of the larceny of the goods (except when they are in the possession of a bailee)—If goods have been seized by the sheriff under an execution levied on the property of some person other than the owner of the goods, the owner, by taking possession of them, cannot be guilty of larceny.

Appeal on certificate of the judge at the trial.

Appellant was indicted at the Worcestershire Quarter Sessions on October 19th for stealing seven live fowls. He was an undis-

1908
20 *November.*
Thomas Knight.

charged bankrupt. After his bankruptcy some friends had set up appellant's wife in the business of a coal merchant and haulier previously carried on by him, and he worked for her, and also did other jobs in his overtime. His evidence was that he had bought these fowls with money earned by him. The prosecution gave evidence that the premises where the business was carried on, and appellant, his wife and family, lived, were rented in the wife's name. There were a yard and a garden adjoining the house, and at the end of the garden was a fowl-pen, in which these seven fowls were. On August 20th execution was levied on the goods of the wife on the premises. The sheriff's officer stated in evidence that the wife told him that everything in the place was hers, but that she had not gone out of doors with him; that she had said nothing about anything out of doors, and he had asked her nothing about the fowl-pen. The bailiff who was in possession on the 20th August stated in evidence that he had told appellant that his wife's goods had been seized; that if appellant had any claim to make he should make it to the High Sheriff; that appellant saw the warrant, and that he laid no claim to the fowls. This evidence was contradicted by appellant, who stated in evidence that he had told the bailiff on August 20th that the fowls were his. About 6.30 p.m. on August 27th, while the bailiff was still in possession, appellant, who had been absent a few days, returned home, and went out to the fowl-pen and took away these seven fowls to sell them. He was arrested immediately afterwards and charged with stealing seven live fowls, the property of the sheriff.

The Chairman expressed to appellant's counsel some doubt on the law of the case, but he also expressed the view that if the fowls were taken in legal process though improperly seized, appellant's only remedy would be by action, and he remarked that no attempt had been made to show that the levy was an illegal one. In summing up to the jury he told them that once the goods were seized by the sheriff, whether they were the appellant's or not, he could not take them out of the custody of the law except by the means prescribed by the law. He put these two questions to the jury: Were the fowls appellant's property? If so, were they seized by the sheriff as the wife's goods? and he directed them that if they answered both questions in the affirmative it would be a verdict of guilty

The jury answered to the first question "Yes," and to the

1908
20 *November.*
Thomas Knight.

second "Yes, under the impression that they were her goods." On appellant's counsel submitting that the answers amounted to a verdict of "not guilty," on the ground that appellant could not steal his own property, the Chairman replied that it had been taken by the sheriff and was in his possession, and he put to the jury the further question, "Do you find that the prisoner took away the goods from the place?" to which they answered "Yes."

The Chairman ruled that the verdict was one of guilty, and he bound over appellant in the sum of 5*l.*

R. Woodcard, for appellant (under sect. 10 of the Criminal Appeal Act), who was not in custody: A person cannot be convicted of stealing his own goods though they may have been in the possession of the sheriff. Here the property was laid in the sheriff. The sheriff's taking must be lawful, but here he was a trespasser and the goods never were *in custodia legis.*

[CHANNELL J.: In any case there is the question whether there was any *animus furandi.*]

That was never left to the jury.

J. R. V. Marchant, for the Crown: It is admitted that if the first finding is good, the verdict cannot be supported. But it was an unreasonable finding. The case was opened that the goods were the wife's and that appellant never made any claim to them. There was plenty of evidence of *animus furandi* if the goods were the wife's. If there was an intent to defraud somebody, not necessarily the bailee, that is enough. That is decided by *Wilkinson and Marsden* (1821), R. & R. 470. If the execution had been against the goods of appellant he might have been guilty of larceny. If the property taken was appellant's, then, as the execution was not against his goods, he could not have been sued by the sheriff for rescue. *Earl of Bristol* v. *Wilsmore* (1823), 1 B. & C. 574; 1 L. J. (O. S.) K. B. 178; 2 D. & R. 755; 25 R. R. 488. On the first finding of fact it is admitted that appellant could not be guilty of larceny.

CHANNELL J.: In effect the Chairman has stated a case for the Court as to what was the proper verdict on these findings. We are of opinion that it was one of not guilty.

Conviction quashed.

JAMES MUIRHEAD.

1908
20 *November.*
James Muirhead.

Intent to defraud—"by means of any other fraud," sect. 13 (1) of 32 & 33 Vict. c. 62 (Debtors Act, 1869)—William Jones's Case followed.
An inconsistent verdict cannot stand.

Appellant was indicted at Newcastle Assizes on October 23rd, before Pickford J., of obtaining goods by false pretences, of attempting to obtain certain other goods by false pretences, and on a third count of obtaining credit by false pretences (under sect. 13 (1) of the Debtors Act, 1869, 32 & 33 Vict. c. 62). Appellant had ordered furniture of the prosecutors. The latter, before completing the order, demanded of him a reference. Appellant sent in reply three distinct names. Two of these represented, to his knowledge, an identical person, which was the false pretence averred. Appellant's defence was that he had no intent to defraud and had no intention of obtaining credit, but had intended to pay cash for the goods. On counts 1 and 2 he was found not guilty. On the third count the learned judge put the following questions to the jury: Did defendant obtain credit by false pretences? Did he do so with intent to defraud? The jury answered the former question in the affirmative and the latter in the negative. The learned judge was in some doubt whether this was a verdict of guilty, but he so entered it, and, in effect, stated a case for this Court.

Kenneth Marshall, for the appellant (under sect. 10 of the Criminal Appeal Act), who was not in custody: The verdict amounts to not guilty, as the jury expressly negatived any intent to defraud. Fraud is necessary in the offence. The words of the section are "under false pretences or by means of any other fraud," and the word "other" shows that the false pretences must be fraudulent. Sect. 18 of the Debtors Act shows that the act charged may be committed without a guilty intent, and the same appears from *William Jones* (see below).

[CHANNELL J.: That section does not apply to trial on indictment. *Dyson*, [1894] 2 Q. B. 176: 63 L. J. M. C. 124; 18 Cox C. C. 1; 58 J. P. 528; 70 L. T. 877; 42 W. R. 526; 1 Mans. 283; C. C. R.]

That was a bankruptcy case.

1908
20 *November.*
James Muirhead.

[PHILLIMORE J.: The best you can say is that they have found guilty and not guilty, and an inconsistent verdict cannot stand.]

Edgar, for the Crown: What the jury meant by their second finding was that appellant intended to pay subsequently, but that he obtained credit under false pretences. The offence is complete under the section if he has obtained credit by false representations.

CHANNELL J.: The judgment of Lord Russell C.J. in *William Jones*, [1898] 1 Q. B. 119; 67 L. J. Q. B. 41; 77 L. T. 503; 46 W. R. 191; 19 Cox C. C. 87; C. C. R., is conclusive on this point. The jury may have been mistaken, but if it is a mistake in favour of the prisoner it cannot be set aside. If it were in favour of the prosecution we might do so. The learned judge has practically stated a case and let appellant out.

In *William Jones* prisoner was convicted of the full offence of obtaining goods by false pretences.

[WALTON J.: The jury have really given a verdict of not guilty. The learned judge directed the jury that if appellant got goods by false pretences with the intention to pay he was not guilty. If a person merely for a joke obtains a ring by pretending that he is a certain duke, and having succeeded in his joke he immediately hands it back, can he be convicted of obtaining goods by false pretences? Everything here depends on the word "other" (fraud) in sect. 13 (1).

PHILLIMORE J.: The word "other" in sect. 13, sub-sect. 1, of the Debtors Act implies that the false pretences must be of a fraudulent character.]

The word "other" is not conclusive, because "false pretences" preceding may include fraudulent false pretences, and also pretences or representations that are false.

WALTON J., delivering the judgment of the Court: There cannot be an offence within the statute unless there is an intent to defraud. It may be that the jury ought to have found that there was fraud. But they have found that there was not fraud. Their two findings do not constitute a verdict of guilty.

Conviction quashed.

1908
20 *November.*
George Dunton.

GEORGE DUNTON (*a*).

Fresh evidence of alibi.

A. C. Fox-Davies, for appellant, called and examined a witness named Herbert Richards, who stated that he was the son of the proprietress and employed in the bar of the "Royal Oak" public-house, that he started work at 8.30 a.m. and that it was his custom to go up and wash at 11 a.m. On the morning of September 24th the appellant and Pilgrim were in the public-house. Witness went up to breakfast at 10 a.m.; he returned at 10.15, they were still there, and they remained there till witness went up to wash at 11 a.m.

Cross-examined by *Finch*, for the Crown: There was no one else there that witness knew. He overheard Pilgrim speaking about hopping. The clock in the public-house was seven minutes fast. Witness always allowed for that, and it was seven minutes past 11 by the clock when he went up to wash. The "George" public-house and Trinity Street were about a quarter of a mile from the scene of the theft, and from one another, and there was no short cut. He did not know of the trial in October. He was first asked to give evidence last week by Mrs. Dunton.

Fox-Davies: If Pilgrim's evidence was true, appellant is innocent. This witness corroborated Pilgrim.

CHANNELL J.: No jury would have altered a verdict on the evidence now called, which, moreover, conflicts with the evidence previously called on behalf of the appellant, which was that he was in the "George" public-house just about 11 a.m. We have all had experience of evidence called as to time where the question is one of a few minutes, and we all know how likely such evidence is to be unreliable. This boy cannot be sure within a few minutes and his attention was not called to the matter till some weeks afterwards.

Appeal dismissed.

(*a*) See p. 165, above.

BEFORE

MR. JUSTICE DARLING, MR. JUSTICE PHILLIMORE AND MR. JUSTICE WALTON.

1908
21 *November.*

Robert Briggs.

ROBERT BRIGGS.

If, on an application for leave to appeal against conviction or sentence, a point of law emerges, the Court will grant leave to appeal on that point.

This was an appeal from an order of Channell J., refusing (1) leave to appeal against conviction and sentence; (2) an extension of time for notice of application for leave to appeal; and (3) legal aid. Appellant was convicted at Lancaster Quarter Sessions on October 19th, before the Vice-Chairman, under the Inebriates Act, 1898 (61 & 62 Vict. c. 60), s. 2, sub-s. 1, of being drunk and disorderly in a highway, and of having been three times summarily convicted within the previous twelve months of an offence within the first Schedule of that Act, and of being a habitual drunkard. He was sentenced to fourteen days' hard labour and three years' detention in an inebriate reformatory.

The notice of application was one day out of time, but the Court at once granted an extension.

Wimpfheimer for appellant (under sect. 10 of the Criminal Appeal Act), who was not present: The sentence is bad in law. Sect. 1, sub-sect. 2, specifies "a term not exceeding three years." Appellant has been sentenced to fourteen days' hard labour, *plus* three years to follow.

[PHILLIMORE J.: He was indicted in a separate count for being drunk and disorderly in a public highway. The fourteen days are for that.]

That is not an indictable offence.

[DARLING J.: All depends on the first Schedule of the Act.

PHILLIMORE J.: It may become indictable when coupled with another offence. I have decided a somewhat similar point under

2 Edw. VII. c. 28, s. 6, in an unreported case, *Willow*, at Huntingdon, May, 1904.

1908
21 *November.*
Robert Briggs.

WALTON J.: There are offences, such as common assault, which may be dealt with summarily and are at the same time indictable.]

Leave to appeal on point of law only granted.

PERCY LETT M'GARRY.

Percy Lett M'Garry.

After conviction, the judge may receive a written report of a prisoner's antecedents.

This was an appeal from an order of Channell J. refusing leave to appeal against a sentence of fifteen months' hard labour, passed by the Common Serjeant at the Central Criminal Court on October 20th, 1908.

The only noteworthy point in the case is that stated in counsel's argument.

St. John MacDonald for appellant (under sect. 10 of the Criminal Appeal Act), who was not present: The *written* and unsworn report which the police officer made to the judge before he passed sentence was inaccurate in many ways. It is never the practice at the Central Criminal Court that the police should furnish a *written* report of a prisoner's past career. It is true that the judge gave prisoner's counsel an opportunity of cross-examining upon it, which he declined.

PHILLIMORE J.: Written police reports are regularly made at Liverpool, Cardiff and other places, and have been sanctioned by the most eminent judges.

DARLING J.: It is often a system of great advantage to the prisoner. Here there was every opportunity for cross-examination.

Application refused.

1908
21 *November.*

Joseph Randles.

JOSEPH RANDLES.

An expression of opinion by the judge of prisoner's guilt, though to be deprecated, must be taken with the context, and is not necessarily a ground for quashing a conviction.

R. Sutton for appellant (under sect. 10 of the Criminal Appeal Act), who was not present, and to whom Channell J. had refused leave to appeal against conviction and sentence on October 28th at the Cheshire Quarter Sessions. He had been convicted of wilfully neglecting his five children, and had been sentenced by the Chairman to twelve months' imprisonment with hard labour. The ground of appeal was: That the one complaint against the prisoner was that from time to time the house was short of food. The prisoner gave way to drink, and after a drinking bout he would lie in the house unfit for work.

On the other hand, the rent was always paid, the children were properly clothed, and there was no suggestion that there was not sufficient furniture or bedding in the house, while the prisoner's wife also supplied something towards the household expenses.

At the beginning of the ten days in question (July 21st to July 31st) he gave his wife 1*s.* 6*d.*, provided a pair of shoes for one of his boys, but on the 22nd he had a drinking bout which laid him up till the 29th, his wife in the meantime earning 6*s.* 1*d.*

On the 29th he went out to work again, paid off a bill of 3*s.*, and gave his wife 7*d.* or 10*d.*, and on that or the next day paid the rent. On the 30th he had a quarrel with his wife, and the police were sent for. Next day the inspector came, and he made wild statements to him, and also to his landlord, about not supporting his children any more, and on the Saturday was arrested on his way to Chester, there being no food left in the house.

The Chairman, in summing up, did not lay any of the facts in favour of the prisoner or in extenuation of his conduct before the jury; and did not mention the fact that the house seemed to be in other respects satisfactory; nor that the wife contributed to the household expenses; or that his actions immediately before his arrest might well be merely the result of the quarrel with his wife; and gave the jury absolutely no direction as to the meaning of the word

1908
21 *November.*
Joseph Randles.

"wilful"; in fact, the word did not occur once in the summing-up. He further seemed to suggest that, contrary to the evidence, the house was in a bad state, and that the children would have been starved to death before this if it had not been for the neighbours—which was certainly an exaggeration of the evidence. He actually said: "I do not think there can be a doubt about it" (prisoner's guilt).

[PHILLIMORE J.: He did, in effect, say so.]

In passing sentence of twelve months' hard labour, the Chairman again seems to have failed to consider any of the facts in his favour, and also that he had been in prison since August 1st.

WALTON J.: Two points are taken – one that the prisoner's case was not properly put before the jury by the Chairman, the second that the sentence was excessive. As regards the first point, the summing-up was short, but it was delivered immediately after the prisoner's statement, which amounted to this: that the prisoner's wife was in part to blame, and that the prisoner himself was unable to work owing to ill-health. The jury would, therefore, have this statement in their minds. The summing-up really meant no more than this: that the jury had now heard the whole evidence, and it was for them to decide, but in his (the Chairman's) opinion, there was not much doubt upon the matter. The Court could not say that they could interfere on this ground, for if the evidence of the prosecution was accepted, there was no doubt that for some time past the prisoner had left the house without sufficient food, and consequently he was properly convicted. With respect to the sentence, they could not interfere; in fact, considering that the prisoner was addicted to drink, it was perhaps the best thing for him. It should, however, run from the date of conviction.

Application dismissed: sentence to run from the date of conviction.

1908
21 *November.*

JOHN JONES, *alias* A. SPANIER.

John Jones, *alias* A. Spanier.

All pending charges against a prisoner should, if possible, be brought to the knowledge of the judge at the trial, and by him taken into consideration on the sentence.

It is undesirable to tack a sentence of penal servitude on to one of hard labour.

This was an appeal from a sentence of five years' penal servitude passed at the Middlesex Sessions, on October 24th, by the Chairman, for three offences of house and shop-breaking, to which appellant had pleaded guilty. Appellant had been indicted for four similar offences at the North London Sessions, and had been there sentenced by the Chairman, on September 15th, 1908, to fifteen months' hard labour. The later sentence was to run from the expiry of the earlier. The three cases for which he was subsequently indicted at Middlesex were not known to the Chairman of the North London Sessions when he passed sentence.

Appellant, in person, pursuant to leave granted by Channell J.

Hurrell, for the Crown: It is a fact that these three later cases were known to the police at the time of the earlier trial.

PHILLIMORE J.: It is clear that appellant was punished by the learned Chairman of the North London Sessions only in respect of the four cases for which he was there indicted, and not in respect of the three cases for which he was indicted at Middlesex Sessions. That being so, he must be punished for the remaining offences. The question is, what is the proper punishment, seeing that he was already undergoing sentence for offences of a similar kind. At the time of that sentence these three cases were known to the police. We had occasion at the last sitting of the Court (*Syres*, p. 172, above) to refer to the Home Office Circular of August, 1896, addressed to police authorities and others. It may be that the police should always inform judges of known charges, so that, if the prisoner consents, they may take all into consideration in passing sentence. But that is a question of propriety, and not of law. We think that if these three cases had been brought to the notice of the learned Chairman of the North London Sessions he would have passed one sentence—probably that one of penal

servitude which was passed at Middlesex Sessions. As a general rule, it is undesirable to impose a term of hard labour to be followed by penal servitude. The judgment of the Court is that the sentence shall be one of five years' penal servitude from the date of the Middlesex conviction.

1908
21 *November.*
John Jones, *alias* A. Spanier.

Sentence reduced.

JOSEPH HENRY HOWELLS AND THOMAS ALLEN.

Joseph Henry Howells and Thomas Allen.

Slight identification of stolen property may be sufficient for a conviction.

E. Owen Roberts for appellants (under sect. 10 of the Criminal Appeal Act), who were present: They were convicted, with two others, at the Montgomeryshire Quarter Sessions, held on the 22nd of October, 1908, for stealing seven fowls on the 15th of September, 1908, and were sentenced to six months' imprisonment with hard labour. They appealed against their conviction, by leave of Channell J., on the grounds that the jury were misdirected by the Chairman in his summing-up, that the verdict was not in accordance with the evidence, and that it was wrong in law.

The four men had been drinking together at certain public-houses in Welshpool on Monday night, the 14th of September, 1908, and were seen together at 9.45 p.m. A police constable was on duty the following morning at 1 a.m. in Raven Square, Welshpool, when he saw Thomas Allen come into the Square from the direction of Mr. Harrison's, the prosecutor's house, followed by the prisoner Howells, who stopped and called out "All right," whereupon the two other prisoners, Kelly and Davies, came into the Square from the same direction. The constable then came from his hiding-place, and went towards Howells, who whistled, and Kelly started running. The constable, observing that Kelly carried something under his coat, arrested him and took him into custody. Three dead fowls were found on him, one being headless. The constable, accompanied by two other police constables, came to Raven Square, and found both Allen and Howells there talking at a street

1908
21 *November.*
Joseph Henry Howells and Thomas Allen.

corner. They were both taken into custody. Howells was allowed to enter his house on the way to the police station, but the police had a scuffle with him before he could be got out of the house. The hands of both Howells and Allen bore blood on them caused by a number of scratches. A feather fell out of Howells's coat when it was opened at the police station. Davies was found asleep in Kelly's house at 2 a.m., and four dead fowls, warm, were found by his side. Seven fowls were missed from Mr. Harrison's hen-roost, and the head of a dead fowl was found in or near the hen-roost. The two prisoners denied the evidence of the first constable, and stated that they had been drinking the night before until 10 o'clock, when they went off and slept under a hedge near Raven Square for two hours to get rid of the effect of the drink, and that they went to Raven Square, where they were arrested by the police.

Counsel submitted that there was no evidence against Allen and Howells except that of the constable, and that both prisoners had sworn that his evidence was incorrect. No evidence had been given that the fowls were those of Mr. Harrison; the witnesses had only stated that the fowls found on the two prisoners Kelly and Davies were "similar" to those stolen. *Benjamin Pearson*, 72 J. P. 449; Criminal Appeal Cases. p. 77, above, was quoted, and it was contended on the authority of this case, that the prosecution should have proved that the fowls found were those stolen.

[Walton J.: That case only shows that there must be identification of the stolen property.]

The two prisoners, had they been guilty, would not have remained in the Square. It had not been proved that the fowls had been in the possession of these prisoners. The verdict of the jury was against the weight of the evidence.

[Darling J. called attention to the feather found on Howells.]

The Chairman was wrong in summing-up against the prisoners collectively. He ought to have given the jury an opportunity of finding against each prisoner separately.

T. E. Morris, for the Crown, was not called upon.

1908
21 *November.*

Joseph Henry Howells and Thomas Allen.

DARLING J. said this was an appeal from two prisoners who had been convicted for robbing a hen-roost in Wales. They were convicted with two others who were found in possession of seven dead fowls. The four men had been drinking together the night before, and had been seen together the next morning at 1 a.m. by a police constable, who arrested one of them with three fowls in his possession. There had been no misdirection by the Chairman to the jury, and there was ample evidence to go to the jury that these four men had been together, and that there was a community of interest between them.

Appeal dismissed.

JAMES ORRIS.

James Orris.

Bare acquiescence in the receipt of stolen property is not the adoption of receipt, so as to constitute receiving. Dring's case *followed.*

Appellant was convicted on October 29th, at the North London Sessions before the Deputy-Chairman, of receiving a box containing various articles, the property of the prosecutrix, well knowing it to have been stolen, and was sentenced to eighteen months' hard labour. His wife, who was indicted with him, was also convicted. The evidence was that the property was stolen between the dates of October 3rd and 5th by a man named Price, who pleaded guilty to the larceny, that the property was brought by Price to the house in which appellant lived, that some small fragments of it were found in the room which he occupied with his wife, that the box was found empty on the leads over the house, but that appellant was not present when it was brought, and that it was received by the wife acting independently of him. With the exception of the small fragments mentioned the property was disposed of by the wife the day she got it. Appellant stated that at 2 p.m. on that day he and his wife were together in a public-house when the latter was called out by Price; that later on that afternoon or evening appellant's wife told him she "was selling" (which appeared from the evidence to mean "had sold") that day things received from Price; that he said to her she ought not to have had anything to do with the things, and that on a subsequent day before appellant's arrest on October 9th, there was a conversation about the property between him and Price, when the latter

1908
21 *November.*
James Orris.

advised him to get rid of the empty box, and appellant said he did not want to get into any trouble. There were also found in the room occupied by appellant and his wife fragments of letters with name and address of prosecutrix.

Eustace Fulton for the appellant (under sect. 10 of the Criminal Appeal Act), who was present. The property was received by the wife without appellant's authority or knowledge and in his absence. All that could be said was that he acquiesced in the receipt in so far as he allowed the fragments of the property and the empty box to remain on the premises. The fact of these things being thus on the premises does not throw the burden of proof upon him. There was a misdirection by the learned Deputy-Chairman that "if they both knew that the property was stolen, and that the wife was acting independently of the husband, they were both guilty." If the wife was acting independently of the appellant, the receiving was by her alone, and he committed no act of receiving. His subsequent acquiescence cannot be said to be a receiving by him.

[PHILLIMORE J.: That part of the learned Deputy-Chairman's summing-up is merely referring to the law, as to the case against the wife, as laid down in *Mary Baines* (1900), 69 L. J. Q. B. 681; 64 J. P. 408; 82 L. T. 724; 16 T. L. R. 413; 19 Cox C. C. 524; C. C. R.

DARLING J. drew attention to a further portion of the learned Deputy-Chairman's summing-up, in which he asked the jury "did they (the appellant and his wife) know, at the time *they* received the property, that it was stolen?" and suggested that that might afford an additional ground for arguing misdirection.]

There was no evidence proper to leave to the jury against appellant. *Dring* (1857), 7 Cox C. C. 382; Dears. & B. C. C. 329; 3 Jur. (N. S.) 1132; 6 W. R. 41.

[WALTON J.: This case is stronger because here there is evidence of appellant's statement to the police that he did not know about the property until his wife told him, and that then, with the exception of these fragments, she said she had disposed of it.]

1908
21 *November.*
James Orris.

J. J. C. Healy, for the Crown: Appellant must have known these things were stolen before his wife sold them, and his own answer in cross-examination ("she was selling") was enough to convict him. There was the evidence of the wife's statement to appellant that same evening. The fact of the fragments and the empty box being on the premises with his knowledge was evidence; at least, it was so of his having received these things themselves. *Woodward* (1862), L. & C. 122; 31 L. J. M. C. 91; 8 Jur. (N. S.) 104; 5 L. T. 686; 10 W. R. 298; 9 Cox C. C. 95. He also referred to *Miller* (1853), 6 Cox C. C. 353 (Ir. Ct. Crim. App.); and to sect. 4 (1) of the Criminal Appeal Act.

[DARLING J.: He was indicted for receiving the box with its contents. His allowing the fragments and the empty box to remain on the premises is explained, with some reason, by appellant's own statement, that if he had given information to the police about them he would probably—in view of previous convictions for larceny, robbery with violence, &c.—have been arrested on the charge of stealing them.

PHILLIMORE J.: There is, however, the point that he had the prosecutrix's address, and that thus he might have returned these things to her.]

DARLING J.: The case is one of considerable difficulty. Price admitted having stolen the box. He brought it to the house occupied by appellant and his wife, and he put it on the leads there. Appellant and his wife were tried respectively for receiving and stealing the box and its contents. The learned Deputy-Chairman dealt in his summing-up at considerable length with the question of a woman acting under the coercion of her husband. But there was ample evidence of the wife having acted independently, and she has not appealed. The husband has appealed, on the ground that there was no evidence against him. There was no evidence that the box was put where it was put with his knowledge. The only evidence of his knowing that it was there is from his own statement as to his conversation with Price. Some gloves and small articles and a quantity of burned paper were found in the room, but there was no evidence that he had touched any of these things There was the wife's statement to him that she had

1908
21 *November.*
James Orris.

dealt with the property, and, as to the small articles, it is true that he afterwards saw her wearing one of the gloves. In certain circumstances, the fact of his not having returned the box or small articles to their owner might have been evidence of receiving, but here the evidence of his knowledge that the box ever was there comes from appellant himself, and is coupled with a credible explanation as to why he did nothing towards returning it. The Court are of opinion that there was not sufficient evidence to go to the jury either of stealing or receiving. Speaking for myself alone, I should not have allowed the case to go before the jury.

Conviction quashed.

BEFORE

THE LORD CHIEF JUSTICE, MR. JUSTICE PHILLIMORE AND MR. JUSTICE WALTON.

JOHN SMITH AND W. EVANS.

1908
27 *November.*

John Smith and W. Evans.

It is improper, in order to identify prisoners, to invite proposed witnesses to see them apart from other persons.

This was an appeal from an order of Mr. Justice Channell refusing leave to appeal.

The appellants were convicted at Caermarthen Quarter Sessions on October 23rd, before the Chairman, of breaking and entering a grocer's shop with intent to steal, and sentenced to three years' penal servitude.

Vaughan Williams, for the appellants (under sect. 10 of the Criminal Appeal Act), who were not present: A number of witnesses were called at the trial to prove that they saw one of the prisoners in the house, and afterwards saw both of them come out. A woman named Lewis said that she saw two men near her shop, and noticed one of them, who was wearing a dark coat, go into the grocer's shop in question. The point raised on behalf of appellants was that the method by which they were identified was unsatisfactory. They were kept at the police station and were there identified by the witnesses whom the police called in for that purpose. No other men were put with the prisoners, who were identified mainly by their clothes, and it was submitted that having in view the fact that the police knew the antecedents of these men, which were unfavourable, the whole procedure of identification was open to grave suspicion.

The prisoners did not give evidence at the trial.

It was true that a window in the shop had been tampered with, and on one of the prisoners was found a knife which tallied with the marks upon the window frame, but having regard to the identification of the prisoners themselves, this evidence was not strong enough to support a conviction.

1908
27 *November.*
John Smith and W. Evans.

PHILLIMORE J.: Leave to appeal should not be given in this case. Without doubt there was a good deal that was unsatisfactory about the identification at the police station, and the Chairman was right in saying that the wrong procedure with regard to this had been adopted. Such methods as were resorted to in this case make this particular identification nearly valueless, and police authorities ought to know that this is not the right way to identify. However, apart from that, there was ample evidence of identification, because both men were seen together and described, and they and the clothes they were wearing exactly answered the description that was given, and there was some other evidence fit for the jury. Therefore, in those circumstances it was impossible to give leave to appeal.

Application refused.

E. Gowlett, *alias* Woodford.

E. GOWLETT, *alias* E. WOODFORD.

Fresh evidence—Alibi—The nature of the evidence of the new witnesses must be disclosed to the Court and to the Registrar.

This was an application for leave to appeal and to call further evidence.

Appellant was convicted of receiving at the North London Sessions, on October 27th, before the Deputy-Chairman, and sentenced to three and a half years' penal servitude with two years' police supervision.

Ralph Thomas, for appellant (under sect. 10 of the Criminal Appeal Act), who was not present: At the trial the prisoner was indicted with another man named Haers for stealing and receiving. Haers pleaded guilty. It was proved that on the 5th October, 1908, the police saw Haers and another man together. The other man, who was not recognised, gave Haers a sack, which, when Haers was arrested, was found to contain stolen goods.

On the 8th October one of the detectives saw Woodford, but did not arrest him until the 9th. The other detective said he knew Woodford very well, as he was then under police supervision. It was given in evidence that on the 8th October Woodford, the appellant, was seen in the road where Haers lodged.

It was submitted on behalf of appellant that the evidence of

1908
27 *November.*
E. Gowlett, *alias* Woodford.

identification was extremely weak, and it was desired that fresh evidence might be called in respect of the *alibis* set up at the trial, which would prove that appellant on the night of the burglary was in bed, and that at the time when he was supposed to have been seen with Haers in the early morning of the 5th October he was actually at Covent Garden.

[PHILLIMORE J.: The Deputy-Chairman told the jury only to convict of receiving.]

The witnesses as to the *alibis* were summoned to appear before the magistrates, but some of them did not come.

The LORD CHIEF JUSTICE: The whole ground of appeal in the notice of appeal is confined to the night *alibi*, as appellant seems to attach no importance to the suggestion that he was at Covent Garden on the morning of the 5th October. Leave to appeal and call two other witnesses as to the day *alibi* will be granted, if their names and the nature of their evidence are mentioned to the Registrar, and a solicitor will be assigned to appellant.

Applications granted.

MARY EAST (*a*).

Mary East.

Fresh evidence.

The witness known as Mrs. Daman was called but was not further examined by *Pegg*, for the Crown. Cross-examined by *du Parcq*, for the appellant, who was present, she said: "I was with my husband (Daman) on the 3rd October from 9 o'clock in the evening onwards. I had been with him to the butcher's, and was going home. I saw a fight was going on, and in the crowd I saw Mrs. East. I heard her say 'Don't hit him, he is too small, I'll see after him,' or words to that effect. She was referring to the prosecutor. Immediately afterwards I heard Mrs. East say 'I will soon get something to settle you.' I saw her go towards her house and when she came back she had a knife in her hand. It looked to me like an ordinary table knife. Mrs. East had a cut on her

(*a*) See p. 183.

1908
27 *November.*
Mary East.

thumb, which was bleeding. She complained to the police officer about it. I saw her draw the knife across the lower part of the prosecutor's back. There were two cuts in his trousers and one in his shirt."

Pegg did not re-examine.

du Parcq then further submitted that the Deputy-Chairman in summing up had not properly referred to the doctor's evidence, which did not exclude the possibility that the prosecutor's wounds might have been inflicted by a stevedore's hook. Appellant had, at the trial, put her character in issue, and nothing whatever was known against her.

PHILLIMORE J.: Additional evidence has been allowed to be called, because at the trial some misunderstanding arose with regard to appellant being represented by counsel. It was thought that she should have an opportunity to cross-examine the witness who have now been called before the Court.

The Court is satisfied that there was abundant evidence to go to the jury that appellant used the knife mentioned upon the prosecutor. She has herself admitted that on the night when the affray took place she had entered into contention with him.

The Deputy-Chairman has doubtless taken appellant's good character into consideration when he sentenced her to be imprisoned in the second division.

Appeal dismissed; sentence to run from the date of the conviction.

Robert Briggs.

ROBERT BRIGGS (*a*).

A habitual drunkard, convicted on indictment under sect. 2 (1) *of the Inebriates Act,* 1898 (61 & 62 *Vict. c.* 60), *cannot be sentenced to imprisonment with hard labour, but only to the detention provided in that section.*

Each offence charged in such an indictment is not (semble) *charged in a separate count, so that there can be a good sentence on each.*

Wimpfheimer, for the appellant, who was not present: The sentence given was beyond the maximum allowed. Appellant was indicted under sect. 2 (1) of 61 & 62 Vict. c. 60 (the Inebriates Act, 1898), and not for being drunk and disorderly, simply. The

(*a*) See p. 192, above.

1908
27 *November.*
Robert Briggs.

offence charged was a compound offence made up of the ingredients there mentioned. The charges in the indictment (*b*) were all contained in one count, and the only sentence which could be passed was three years' detention. He cited *Penfold*, [1902] 1 K. B. 547; 20 Cox C. C. 151; 71 L. J. K. B. 306; 86 L. T. 204; 50 W. R. 671; 66 J. P. 248; C. C. R.

(*b*) The indictment ran as follows:—

Lancashire to wit. } The jurors for our Lord the King upon their oath present that Robert Briggs on the twenty-third day of September in the year of our Lord one thousand nine hundred and eight was unlawfully guilty while drunk of disorderly behaviour in a certain public highway to wit County Square situate at Ulverston in the said County against the form of the Statutes in such case made and provided. And the jurors aforesaid upon their Oath aforesaid do further present that the said Robert Briggs within the twelve months next preceding the commission of the offence hereinbefore charged and stated was summarily convicted four times of certain offences mentioned in the first schedule of the Inebriates Act 1898 to wit on the twenty-ninth day of May in the year of our Lord one thousand nine hundred and eight before a Court of Summary Jurisdiction sitting at Ulverston in and for the said County for that he the said Robert Briggs was found unlawfully drunk on the twenty-eighth day of May in the year of our Lord one thousand nine hundred and eight in a certain public place situate at Ulverston in the said County. And on the ninth day of June in the year of our Lord one thousand nine hundred and eight before a Court of Summary Jurisdiction sitting at Cartmel in and for the said County for that he the said Robert Briggs was unlawfully guilty while drunk of disorderly behaviour on the eighth day of June in the year of our Lord one thousand nine hundred and eight in a certain public place situate at Holker Upper in the said County.

And on the sixteenth day of July in the year of our Lord one thousand nine hundred and eight before a Court of Summary Jurisdiction sitting at Ulverston in and for the said County for that he the said Robert Briggs was unlawfully guilty while drunk of disorderly behaviour on the third day of July in the year of our Lord one thousand nine hundred and eight in a certain public place situate at Ulverston in the said County. And on the thirteenth day of August in the year of our Lord one thousand nine hundred and eight before a Court of Summary Jurisdiction sitting at Ulverston in and for the said County for that he the said Robert Briggs was unlawfully guilty while drunk of disorderly behaviour on the twelfth day of August in the year of our Lord one thousand nine hundred and eight in a certain public place situate at Ulverston in the said County.

And the Jurors aforesaid upon their oath aforesaid do further present that the said Robert Briggs is a habitual drunkard within the meaning of the second section of the Inebriates Act, 1888.

1908
27 *November*.
Robert Briggs.

Singleton, for the respondents: The indictment contained three counts. They alleged separate offences, and if those offences were proved, the Court had power to pass sentence in respect of each. The offence of being drunk and disorderly became indictable in connection with the other charges. Under sect. 12 of the Licensing Act, 1872, a man convicted of being drunk and disorderly in a highway can be sentenced to (a maximum of) one month's hard labour, and by virtue of sect. 2 of the Inebriates Act, 1898, that power belonged to Quarter Sessions; if the legislature had not so intended, a power to detain pending arrangements for removal to a home would have been given. A power to punish for being drunk and disorderly is given by the Licensing Act and is not expressly taken away by sect. 2 of the Inebriates Act, and therefore two sentences can be imposed. The hard labour was imposed not only as a punishment but also in order that the necessary arrangements might be made to remove appellant to a home.

The Lord Chief Justice: In this case the question we have to decide is whether or not, when a man has been convicted under sect. 2 (1) of the Inebriates Act, 1898, he can, in addition to being detained for the three years mentioned in the section, be also sentenced to a term of imprisonment. At the trial the indictment was dealt with as though it contained different counts, but the decision of this Court rests upon the question of law, and not upon the way the case was conducted at the trial. Before 1898, according to ancient custom, nobody was indicted for being drunk and disorderly; and though it may be possible now under sect. 12 of 35 & 36 Vict. c. 94 (the Licensing Act, 1872), the practice is to proceed summarily under sect. 51 of the same Act. The object of sect. 2 (1) of the Inebriates Act, 1898, was to give the Courts power to detain a person for three years, against whom all the charges preferred under that section were proved. Accordingly the charges in the present indictment must be taken to be parts of the same offence. That view is confirmed by the language of sect. 1 of the Act of 1898. That section says: "Where a person is convicted on indictment of an offence punishable with imprisonment or penal servitude, if the Court is satisfied from the evidence that the offence was committed under the influence of drink, or that drunkenness was a contributing cause of the offence . . . the Court may, in addition to or in

substitution for any other sentence, order that he be detained for a term not exceeding three years . . . in any reformatory . . ." In the following section, under which appellant was indicted, the words "in addition to or in substitution for," are not used. The absence of any indication that other punishment besides detention is to be inflicted shows that the punishment intended is provided for in the section. It is said that if that be true, Quarter Sessions would not have power to detain anyone for an hour, but there is a practical answer that the prosecution would be ready with a reformatory to which the offender, if convicted, might be immediately sent. Failing that, sentence should be postponed. Appellant has already undergone thirteen days' hard labour, but these will be allowed to him. The only sentence which Quarter Sessions had power to pass was detention in an inebriate reformatory for three years, and that is the order which must now be made, detention to run from date of conviction.

1908
27 *November.*
Robert Briggs.

Sentence of hard labour quashed.

Solicitor for the Respondents, the County Police—*Harcourt E. Clare, Preston.*

MAX ALBERT MARTIN.

Max Albert Martin.

Concurrent sentences of penal servitude and hard labour are to be avoided.

Appellant was convicted at the North London Sessions, on October 29th, for obtaining flowers by false pretences. The indictment contained five counts, to all of which, with the exception of the first, appellant pleaded guilty. Those to which appellant pleaded guilty were for obtaining credit by fraud. He was sentenced by the Deputy-Chairman to three and a half years' penal servitude on the first count, and twelve months' imprisonment with hard labour on the others, the periods to run concurrently. The appeal was by leave of Channell J. against this sentence.

Yelverton, for the appellant (under sect. 10 of the Criminal Appeal Act), who was not present: The offence in question had been committed by appellant in circumstances of a peculiar nature. He obtained flowers for rooms which he was occupying on the pretence that they were for a certain Baroness. The flowers were worth 6*l.*, but it was proved that appellant had no use for them, and

1908
27 *November.*
Max Albert Martin.

gained no benefit by obtaining them, and that the next morning they were found lying inside the grate in appellant's rooms destroyed and worthless. It was submitted that appellant suffered mentally, and that what he did was beyond all reason and quite inexplicable.

The Lord Chief Justice: The sentence in this case is not excessive. The appellant has been repeatedly convicted, and therefore must be taken to understand the results of such proceedings as these. He may be weak-minded, but the only reason for reducing the sentence would be that he was not looked after where he is. That, however, need not be feared, every provision being made for such person's safety and proper supervision. As, however, a sentence of hard labour makes it difficult for a prisoner to obtain good marks when he is undergoing a term of penal servitude, the sentence of twelve months' hard labour will be reduced to one day's hard labour. The rest of the sentence must stand.

Sentence reduced.

George Carpenter.

GEORGE CARPENTER.

Leave to appeal being granted by the single judge, who was also the judge at the trial, does not imply a doubt as to the conviction being right.

Appellant was indicted, under sect. 18 of 24 & 25 Vict. c. 100, at the Worcestershire Assizes, on October 31st, 1908, before Mr. Justice Darling, for having occasioned grievous bodily harm to a certain Miss Mills, with intent to do her grievous bodily harm. He was convicted, and sentenced to seven years' penal servitude. He appealed against this conviction by leave of Mr. Justice Darling.

Prosecutrix, Miss Mills, was cycling on Sunday, August 2nd, not far from Yardley, and as she was going towards a place known as Scribner's Lane a man jumped out of the fence, seized her by the throat, dragged her off her bicycle, and seriously assaulted her about the head. Appellant was seen by several witnesses in the locality on the day in question. They recognised the man

1908
27 *November.*
George Carpenter.

himself, but some were of the opinion that the suit he was wearing on the day in question was somewhat lighter in colour than that in which he appeared at the trial. There was no evidence that he had any other suit, and he swore that he had none.

Sherwood, for the appellant (under sect. 10 of the Criminal Appeal Act), who was not present: The grounds of appeal were (1) that the verdict could not be supported by the evidence; (2) that there had been a miscarriage of justice. Prosecutrix was unable to identify the appellant, and was of the opinion that the clothes that were worn by the man who assaulted her were lighter in colour than those worn by the prisoner at the trial. Therefore the case for the prosecution depended upon other witnesses. There was no blood found upon the appellant's clothes, contrary to what one would have expected, if he was guilty, having regard to the nature of the injuries inflicted. It was true that appellant was seen not far from Scribner's Lane soon after the time that the outrage was committed, but there were no suspicious circumstances connected with his appearance or behaviour. His account may have been inaccurate in immaterial details, but all the evidence for the prosecution was consistent with his evidence. There was a grave conflict among the witnesses who claimed to recognise him and the prosecutrix herself, and she had failed to identify him. The only satisfactory solution was that another man not unlike appellant, but wearing lighter clothes, was the assailant. Appellant's story was that he had been in a field watching some men fishing during the whole of the time in question. It was also submitted that the learned judge did not deal with the negative evidence that was adduced, and that he did not properly refer to prosecutrix's evidence with regard to the different colour of the clothes. Appellant had said to the police officer that if Miss Mills identified him he would make it hot for her when he came out, but this statement, which was referred to by the learned judge, ought not to have been commented upon as the statement of a guilty man.

H. G. Farrant, for the Crown, was not called on.

The Lord Chief Justice: It does not follow that because the learned judge gave leave to appeal in this case, that he had any doubt about the conviction being a proper one. Appellant was seen by a number of witnesses, and if the evidence of the

1908
27 *November.*
George Carpenter.

witness Mortiboys is to be believed, the charge is brought home to appellant with certainty. That witness met the appellant, whom he had known for nineteen or twenty years, and immediately afterwards he met Miss Mills. It is true that he heard no cries, but it must be remembered that the assailant put his fingers in prosecutrix's mouth, and therefore calling out might be rendered difficult. The question of the clothes is not so important as it is suggested, seeing that so little difference in the colour of them is observed. The statement which appellant made was certainly one to be left to the jury, and to be considered by them.

Appeal dismissed.

Edward Dunleavey.

EDWARD DUNLEAVEY.

Sect. 11 (1) *of the Criminal Appeal Act is mandatory.*

In this case appellant had stated in his notice of appeal that he wished to be present on the hearing of the appeal. It now appeared that he was ill in prison.

The Lord Chief Justice: Sect. 11 (1) of the Criminal Appeal Act is binding upon us, and appellant has a right to be present when the appeal is on a question of fact. The appeal must therefore stand over.

Hearing adjourned.

Edwin Anthony Hampshire.

EDWIN ANTHONY HAMPSHIRE.

Fresh evidence—The Court will not quash a conviction when evidence is forthcoming, after the trial, of previous convictions of a material witness for the prosecution, unless those convictions affect his credibility.

Appellant was indicted for arson at Lewes Assizes, before Mr. Justice Grantham, on November 9th. He was convicted and sentenced to six months' imprisonment with hard labour.

Gatehouse, for the appellant, who was present: The machinery of the Court had brought about a miscarriage of justice. The bill against appellant would have been in the natural course one of

1908
27 *November.*
Edwin Anthony Hampshire.

the last to be presented to the Grand Jury, but the bills were inverted, with the result that this particular bill was found first and appellant's case was called on first, and before the solicitor and witnesses on his behalf were ready. An adjournment was not applied for when the case was called on, as counsel was expecting the witnesses, who were coming from Winchester, to arrive at any moment. A telegram had been sent by the defending solicitors to the Clerk of Assize on November 7th, and a reply had come from him that the case would not come on till Tuesday, the 10th. Counsel had the solicitors' affidavit to that effect. At the trial counsel did not know of this telegram. The evidence for the prosecution rested solely upon the evidence of one man. There were materials actually to hand, but not put before counsel, which would have enabled the latter to cross-examine this witness as to credit, and it was submitted that as previous convictions had been registered against this witness, the jury would not have believed his evidence. It was only his oath against appellant's. Evidence as to appellant's good character was not forthcoming at the trial, because a witness had not arrived, and though the learned judge told the jury that they were to take his good character for granted, yet the whole of the proceedings were disarranged by the turn affairs had taken, and it was suggested that a serious miscarriage of justice had been occasioned thereby.

Raven, for the Crown, was not called on.

The Lord Chief Justice: This is another case which illustrates the disadvantage under which this Court labours through not having the power to order a new trial. The learned judge, we think properly, allowed the case to go on, and he took precautions to ensure a just hearing. The previous convictions against the witness who gave evidence for the prosecution were for assault and using bad language, but it cannot be suggested that those convictions would seriously affect his evidence in this case. Appellant's good character was taken into consideration, and therefore we do not think there has been any miscarriage of justice.

Appeal dismissed; sentence to run from the date of conviction.

Solicitor for the appellant: *Lamb, Lewes.*

BEFORE

MR. JUSTICE DARLING, MR. JUSTICE PHILLIMORE, AND MR. JUSTICE WALTON.

PHILIP JACOBS.

1908
4 *December.*
Philip Jacobs.

Slight corroboration of an accomplice is sufficient to support a conviction.

This was an appeal from an order of Mr. Justice Darling refusing leave to appeal against conviction and sentence.

Appellant was convicted at Leicestershire Assizes before Mr. Justice Jelf, on 4th November, of receiving stolen property and sentenced to seven years' penal servitude.

Lindsey Densham for the appellant (under sect. 10 of the Criminal Appeal Act), who was not present. The stolen property, which was worth some thousands of pounds, was bought by appellant for eighty pounds. The only evidence against him, however, was the testimony of a man named Spencer, who turned out to be one of the burglars engaged in obtaining the goods, for which offence he and others were now undergoing punishment. This man gave evidence of the receipt of the goods by appellant. It was submitted that there was no corroboration of this evidence, and leave to appeal was asked for on the ground that the jury were wrong in convicting on the statement of an accomplice without the necessary corroboration being forthcoming. The only other evidence against appellant was a contradictory statement at the time of his arrest with regard to his association with Spencer. When told that Spencer made accusations against him, appellant first said he never knew Spencer, and then said that if he did, he met him somewhere on a racecourse. It was true that there was evidence that appellant had been in Spencer's company.

DARLING J.: The judge's report on this case shows that appellant and Spencer and the other convicts were connected, that there was

1908
4 *December.*
Philip Jacobs.

evidence that they consorted together, that some of them knew the inside of appellant's rooms, and that appellant's denial of any knowledge of them was untrue. Appellant was undoubtedly the receiver of property the proceeds of burglaries carried out in Leicester and the neighbourhood. The evidence against appellant was conclusive, but it was the evidence of one of the burglars himself. Although in strict point of law that evidence was sufficient, yet it is customary for the judge to tell the jury that it needs corroboration. In this case, however, having regard to the decided cases, we think there was sufficient corroboration of the evidence given by the man Spencer.

Application refused.

Solicitor for the Appellant—*P. S. Costerton.*

Walter Westacott.

WALTER WESTACOTT.

If a point of law emerges on an appeal against conviction or sentence, the Court will, if necessary, extend the time for appealing.

This was an appeal from an order of Mr. Justice Darling refusing leave to appeal against conviction.

Appellant was convicted at Winchester Assizes, before Mr. Justice Lawrence, on 7th November, of uttering a forged receipt, and was sentenced to eighteen months' imprisonment with hard labour.

It appears that appellant was a quartermaster-sergeant in the 16th Lancers, and the receipt referred to was in connection with the sergeants' mess account, over which appellant had direction. He also had a different set of accounts to keep called squadron accounts. It was his duty to obtain a cheque for expenses connected with his department from the regimental sergeant-major, who in turn received it from the adjutant. Appellant received 8*l.* 9*s.* 8*d.* on one of these occasions, and when accounting for it produced a receipt for 2*l.* 2*s.*, which sum he was supposed to have paid away. This turned out to be a forged receipt.

R. S. Nolan for the appellant, who was not present. When counsel for the prosecution opened the case at the trial he referred to a statement made by the prisoner to a Captain Eccles in respect

1908
4 *December.*
Walter Westacott.

of his squadron accounts, in which the prisoner said: "I am 60*l.* out in my accounts; if you will let me have a little money, with the help of my deferred pay I can get all right."

[Darling J.: That would only be introduced to show that at that time appellant was in need of money.

Walton J.: Intent is the substance of the offence in cases like these.]

Upon that statement appellant was arrested, court-martialled and sentenced to reduction and six months' imprisonment. The sentence, however, was not confirmed by the Judge-Advocate, and on the 17th July he was brought before a magistrate on this charge, which is not that which was preferred against him at the court-martial. The statement to Eccles was again opened to the jury, and it was submitted that if it meant anything, it amounted to a confession of guilt on the other charges and so ought to have been excluded. The proceedings before the court-martial in respect of the other charges and the conviction of appellant thereon were given in evidence. The statement to Eccles and the proceedings before the court-martial ought not to have been received in evidence.

Darling J.: Appellant appeals from an order of mine refusing leave to appeal against conviction. We do not think that there is any ground for appealing against the sentence, but it appears that the application is based upon a point of law, and therefore it is not necessary to obtain leave to appeal. If this application were dismissed, the appellant would still have a right to appeal. But he is in this difficulty, that he is out of time. However, as we think there is probably a point of law to be argued, we do not think that the objection ought to stand. Time for appealing will be extended for ten days.

Application refused: time for appealing extended.

Solicitors for the Appellant—*Eve and Clinton, Aldershot.*

1908
4 *December.*

Marcus Edward Septimus Bernard.

MARCUS EDWARD SEPTIMUS BERNARD.

An inferior who takes part in transactions which he must be presumed to know to be fraudulent, is liable to conviction, even though every act he performs is done by his master's orders.

In some cases, where defendants do not give evidence, juries ought to be directed to draw an inference.

This was an appeal from an order of Mr. Justice Darling refusing leave to appeal against conviction and sentence.

Appellant was one of two prisoners who were convicted of conspiracy to defraud at the Central Criminal Court on November 13th, and was sentenced by the Lord Chief Justice to twelve months' imprisonment with hard labour. The jury had disagreed when the prisoners were tried on a previous occasion. The case was known as the Welsh Slate Quarries Fraud, and it appeared that there were two principals connected with the fraudulent company, Gyde and Darby, who were the moving parties in the frauds that had taken place.

E. Percival Clarke for the appellant (under sect. 10 of the Criminal Appeal Act), who was present. The ground of appeal was that there had been a miscarriage of justice. The charge was one of conspiracy, and conspiracy must be defined as meaning an agreement by two or more persons to effect an unlawful purpose. The agreement is an act in advancement of the purpose conceived in the mind of each. Here appellant, who was the secretary of the company, merely acted as paid servant of Darby, and had nothing to do with any fraudulent prospectus that had been issued. He took no share of the profits, and there was no evidence to show that he knew of any fraud at all. Appellant was paid 2*l.* 10*s.* a week as a servant, and had no controlling influence on the company whatever, and evidence to this effect was given by witnesses for the prosecution.

The Lord Chief Justice at the trial had referred to the absence of the prisoner from the witness-box, and told the jury they must draw their own conclusions from the absence of his explanation. Here the prisoner could only have repeated the evidence referred to given by the prosecution, and the unusual course of referring to his failure to give evidence amounted to an invitation to convict, and should not have been adopted.

1908
4 *December.*
Marcus Edward Septimus Bernard.

The appellant had, as secretary, signed letters containing untrue statements; he had, as trustee, been a party to a fraudulent conveyance, but no criminal charge was made in respect of this. He had also given directions for the name of Robinson, McAndrew & Co., another name under which Gyde traded, to be removed from the door of the office of the Welsh Slate Quarries Company.

Appellant further contended that this sentence for a first offence was too severe, and he desired now to call evidence as to his good character since leaving the company two and a half years ago.

DARLING J.: It is right that juries should know, and, if necessary, be told, to draw their own conclusions from the absence of explanations by the prisoner. Here he failed to give any explanation of the circumstances in which he signed letters containing false statements; and he, a grown man and the brother of Gyde, must have known the fraudulent nature of the transactions carried on by the company by whom he was being paid. From what has been proved, it follows that he must have committed hundreds of small acts of dishonesty and told innumerable lies in the course of his service. There was abundant evidence of his guilt, and the jury were justified, in the absence of explanation by him, in convicting him. The sentence was not excessive, and the testimony of witnesses to character would not now affect it.

Applications refused.

ETHEL HARDING.

Ethel Harding.

The "special verdict" of "Guilty, but insane" must be found in unequivocal language—Temporary insanity is not a defence in criminal law.

The "rider" to the verdict of a coroner's jury is not part of the inquisition and cannot be given in evidence.

This was an appeal against conviction on the grounds of non-reception of evidence and of misdirection, and an application for leave to appeal against an order of Darling J. refusing leave to appeal against conviction on a question of fact. Appellant was tried at the Central Criminal Court on Nov. 11th, for the murder

1908
4 *December.*
Ethel Harding.

of her new-born illegitimate child, before Mr. Justice Bigham. The verdict was, "We find the prisoner guilty, with the strongest possible recommendation to mercy, and we consider she was in a frenzied state of mind at the time the act was committed." The learned judge entered a verdict of guilty, and pronounced sentence of death. That sentence had been commuted to penal servitude for life.

Herman Cohen for the appellant (under sect. 10 of the Criminal Appeal Act), who was not present. There was no dispute as to the facts, except, perhaps, whether one or two weapons had been used. Appellant was in domestic service, and early on the morning of October 2nd had been delivered of a full-grown female child, which had had a separate existence and lived some minutes. She was alone at the time of the birth, but owing to certain indications which were noticed a doctor was called in, and though he did not discover that she had been delivered he ordered her to be sent to an infirmary. Her fellow-servant partially packed her boxes for her, and they went with her to the infirmary, where she had no access to them. On October 5th a nurse noticing a smell from one of the boxes had it opened, when the dead body of a child wrapped in some underclothing was found. It had an incised wound across the throat, two and a half inches in length, extending through the windpipe and severing the blood-vessels of the neck. There were also some punctured wounds and some of the ribs were fractured. In one of the boxes a small pair of ordinary scissors was found, with traces of mammalian blood; the doctor would not say it was human blood. No other weapon able to have caused the death was found. One medical witness thought that death was due to the wound in the throat, and that this could not have been inflicted by the scissors (produced). The coroner's jury found wilful murder, and added a rider, "We all agree that she was not responsible for her actions at the time." The non-reception of evidence complained of was that the learned judge refused to allow this rider to be given in evidence by the doctor, who was at the inquest.

[PHILLIMORE J.: You could not get it from a witness. You could read the inquisition. Also, if the verdict was self-contradictory, you could, on a good ground, have it brought up and quashed.]

1908
4 *December.*
Ethel Harding.

The learned judge's objection was understood to be not to the form of proving the rider, but to its being proved at all. Appellant was charged on the coroner's inquisition as well as indicted, and therefore the whole inquisition was let in, just as the indictment was. Among the formal conclusions given in the text-books of coroner's juries' verdicts were often matters of defence, *e.g.*, the jurors "further say that the said E. F. by misfortune and against his will did kill the said C. D.," or "do further say that E. F. in the defence of himself did kill the said C. D.," and they may find any one an accessory to a murder.

[DARLING J.: Then if the prisoner may put in a rider, so may the Crown?]

Certainly.

[DARLING J.: Then if a coroner's jury found, for example, "Guilty, and we think it one of the most abominable crimes ever committed," this could be given in evidence to the petty jury?]

Yes; but no coroner would allow that to appear in the inquisition. At any rate, if it is in prisoner's favour, it is unfair it should not appear.

[PHILLIMORE J.: I have the inquisition here: the rider is not, in fact, in it.]

That did not appear at the trial, and makes all the difference.

Next, as to the scissors. If appellant had had legal aid before the trial, medical evidence might have been—there was reason to believe—called to show that the doctor who thought the death-wound could not have been inflicted by the scissors was perhaps mistaken. This was important because the theory of the defence was that death was due to an accident, but this could not be maintained if two weapons were used.

[The Court said that it attached no importance to this question.]

The misdirection suggested was in the presentation of the defence, which was that appellant had prepared herself with the

1908
4 *December.*
Ethel Harding.

small scissors produced, which lay handy to the bed, in order to cut the umbilical cord, and that at the critical moment she collapsed mentally and physically, with the result that, through convulsive movements of her hand, the child was stabbed almost at the moment of birth, and either fell with its throat on the open blade or the latter was accidentally drawn across the throat. Her own account was: "I put the child in the box; it was born while I was in the bed and I wrapped it up in my clothes. . . . I tore it from me and put it in the box." It was obvious that her mind was a blank for some time after delivery, for even at the infirmary she persisted that she had not borne a child, when she must have known that the body was in her box, which had been taken from her, and a mere lie could not help her. The people at the house, too, did not know that she had been delivered. This was strong corroboration that for a time she really had lost consciousness of what had happened, and on recovering had not remembered it. The medical evidence admitted that such kind of collapse was not uncommon in childbirth. The jury took this view, and asked the learned judge "whether, in the event of our finding that she murdered the child, but was not at that time responsible for her actions"—"by which," said the learned judge, "I understand you to mean that she was not in her right mind." The foreman of the jury, "That is so, my lord"—"we may return a verdict to that effect." To which the learned judge replied, "My answer to that is, Yes, if there is evidence that she was not in her right mind . . . . there is no evidence that this girl was not in her right mind; there are suggestions but there is no evidence; she has not called any evidence to show that she was not." That is strongly complained of, because the whole case of the defence was that there could be no evidence of her temporary collapse because she was alone and her memory a blank. That might have been put to the jury.

[PHILLIMORE J.: "Evidence" clearly means legal evidence; not *direct* evidence by witnesses.]

A jury would not understand that. Then the learned judge never mentions in terms the "special" verdict of "guilty but insane," which, it is safe to assume, the jury would have adopted. What he said was: "There is no evidence that such a thing [as

1908
4 *December.*
Ethel Harding.

loss of reason] happened on this occasion, and it is for the person who is accused to prove that affirmatively. . . . It is for the accused person who desires to rely upon the defence, if it may be so called, of insanity, to prove the insanity affirmatively. There is, as far as I can see, no attempt to do so here." Again, the effect of the following words on a jury may be conceived: "And I want to point this out to you, too: that if you find that she was not in her right mind, not responsible, as you say, for her actions at the time, the result is this, that she will be sent to a criminal lunatic asylum, for which, in my opinion, she is not fit at all, and she may be confined there for a very long time indeed." It is submitted that this is not the law. By the Criminal Lunatic Act, 1884 (47 & 48 Vict. c. 64, ss. 2 (2), 5 (2)), the Home Secretary has ample power to deal with prisoners who, though found technically "insane," were in fact only suffering from temporary aberration. As to temporary mental disturbance, there was a case (mentioned by Kenny, "Outlines of Criminal Law," p. 61; *Baines*, the *Times*, Jan. 25th, 1886), where Mr. Justice Day had laid it down that whether the insanity (caused by intoxication) was permanent or temporary, it equally excused acts done.

[Darling J.: Temporary insanity is not known to English law.]

Finally, the learned judge went on:—"I know well what you want to do. You want to find her not guilty of the murder. I know that well enough; and if you can persuade yourselves upon the evidence reasonably that she did not murder this child it is competent for you to say so. It will be your verdict: I shall not blame you for it." No jury could resist these words ("you want to, &c."); but it was a judge's verdict, not a jury's. If "Not guilty" was not proper to be entered, the finding at least amounted to "Guilty, but insane." In the case of *Hannah Cox* (Kenny's "Outlines," p. 56; the *Times*, July 29th, 1901), tried by the same learned judge, he had advised the jury to find "Guilty, but insane," "though she had shewn no other symptoms of insanity, either before or after" the act of drowning two of her children, and had expressed the hope that her detention would not be long. The consequence of such a verdict, if it was the true construction

1908
4 *December.*
Ethel Harding.

of the finding, was not for the Court. What the jury really meant they had embodied in a letter and a petition voluntarily sent to the Home Office two days after the trial. As this Court can inform itself from any source, counsel desired to read a copy of these documents.

[The Court declined to hear them.]

Appellant was entitled to have the death sentence quashed.

Leycester, for the Crown, was only called on as to the point of the rider to the coroner's jury's verdict. The rider is a mere *obiter dictum*, and forms no part of the inquisition. A coroner's jury cannot consider the question of insanity, which is a matter of defence, any more than a grand jury, as it has been held in the case of the latter.

DARLING J.: In this case appellant was convicted of wilful murder. The jury said: "We find her guilty, but her mind was in a frenzied condition when she committed the act." She was defended upon the grounds that the wounds might have been inflicted by accident. But there was a wound in the throat two and a half inches long, the lower jaw was fractured, as was also the collar-bone, and there were numerous punctures in the body. In face of this it cannot be said that the wounds were caused accidentally, appellant not knowing what she did. We are also asked to believe that appellant never knew that she had been delivered of a child at all, although she had hidden the body in a box. The jury did not accept that theory. It is clear these wounds were not committed by accident, and therefore it was murder unless appellant was insane at the time. The learned judge who tried the case said there must be evidence of insanity, and although there were suggestions of it, there was no real evidence to that effect. The jury had been told that they could find her insane if they liked. To the verdict returned the jury added the rider which has been mentioned, but that does not amount to the statutory qualification of murder. The sentence, in this case, has already been commuted, and appellant will be dealt with in the ordinary way. Had the defence of insanity succeeded, she would have been confined indefinitely in a criminal lunatic asylum. It is said that the

1908
4 *December.*
Ethel Harding.

learned judge should have admitted other evidence. Appellant was arraigned upon the indictment of the grand jury and the coroner's inquisition. The coroner's jury find facts and a verdict is entered which is a conclusion from their finding. The coroner's jury is to some extent in the position of the grand jury. The rider attached to the coroner's verdict is not part of the verdict itself and has no legal effect. The prosecution cannot give such rider in evidence any more than the defence. Counsel for the defence might have read the coroner's inquisition, just as he might have read the indictment, because appellant was tried on both, but that does not entitle him to read to the jury the rider. Counsel had not read the inquisition to the jury, and, as it now appears, it would not have helped the defence, even had he read the whole document, as it does not contain the rider. The proper direction was given.

Appeal dismissed.

JAMES ADAM GRAY (*a*).

James Adam Gray.

Fresh evidence—Nature of the weapon alleged to be used under provocation and in self-defence.

Mrs. Helen Gray was called for the defence, and examined by *C. G. Moran.* She was absent at the trial, owing to illness. She stated that she was present with her husband and daughter on September 20th. She was with them in the back room when Moore, the landlord, came in. Witness said that the landlord started shouting at her husband and knocked off his spectacles. He (the landlord) stated that he had come for his rent. They looked like fighting, and witness ran into front room, calling out of the window for help. She then went into the back room, and, the landlord threatening her, she went out into the front room again and locked herself in.

Cross-examined by *B. A. Smith,* for the Crown, she admitted that when the police came she did not complain to them that the landlord had knocked off her husband's spectacles.

Helen Gray, daughter of the first witness, was called, and corroborated her mother's story.

(*a*) See p. 154, above.

1908
4 *December.*
James Adam Gray.

Moran said that owing to the illness of appellant's wife his case had never been properly tried by a jury, for his chief witnesses, the wife and child, were absent from the trial; and as there was no power to order a new trial, the case never would be properly tried by a jury. The case for the prosecution was that appellant's wife was never in the back room at all, and that appellant, after a dispute with his landlord as to the payment of rent, hit him over the head with a hammer. The case for the defence was that the three persons were in the back room together, and that there was an altercation and a *fracas* over the question of the payment of rent. The woman then went into the front room and broke a window, calling "Police" to the police station on the opposite side of the road. She then returned to the back room, but the landlord threatening her, she returned to the front room. The landlord followed her, and appellant, fearing for his wife's safety, followed the landlord and struck him over the head with a hammer.

[PHILLIMORE J.: Assuming for the purposes of argument that the case for the defence was proved, can you justify this severe blow with a hammer?]

As there was a threat to a pregnant woman within a month of her confinement, followed by instant pursuit, a jury might well and properly find that appellant acted properly in defence of his wife. He submitted that was a question for the jury, and that the question had never been properly tried by the jury, and never would be.

DARLING J.: There was ample evidence for finding that appellant was guilty of occasioning bodily harm. The jury thought that the methods adopted by appellant—he had used a hammer—were not justified by the provocation he received. The evidence called does not show that the landlord Moore was about to attack appellant's wife. We do not think that the verdict was wrong. The sentence of six months' imprisonment in the second division which appellant received, was in no way excessive.

Appeal dismissed: sentence to date from conviction.

BEFORE

MR. JUSTICE DARLING, MR. JUSTICE WALTON, AND MR. JUSTICE PICKFORD.

WILLIAM WARNER.

1908
5 *December.*
William Warner.

If evidence of a previous conviction is accidentally given at the trial, the jury must be emphatically directed to disregard it.
A jury must be cautioned against the evidence of an accomplice.

This was an appeal, by leave of Darling J., against a conviction for stealing a bag, upon which charge appellant was tried on November 13th at the North London Sessions, with another man named Brown, before the Deputy-Chairman, and sentenced to three and a half years' penal servitude and three years' police supervision.

It appeared that on the night of the 4th October, the prosecutor and a woman were in search of lodgings, and met appellant and a man named Brown. The latter were asked if they knew of any lodging, and they volunteered to guide the prosecutor and the woman to a place that would suit them. The woman was carrying a bag belonging to the prosecutor, but, at appellant's suggestion, she allowed him to carry it for her. All four walked together and tried at one or two houses to obtain admission, but without success. Eventually they stopped at a house, into which appellant, carrying the bag, and Brown disappeared. No more was seen of Brown, but appellant came out without the bag to say that he could not find the prosecutor and the woman room. Whereupon the bag was asked for, and appellant said he would try and find it. He was unsuccessful, and returned to the prosecutor and the woman, suggesting that they should call a constable and go to the police station together.

Symmons, for the appellant (under sect. 10 of the Criminal Appeal Act), who was present. It was desired to call evidence

1908
5 *December.*
William Warner.

to prove that appellant was not with Brown for three days preceding the commission of this offence. It was mainly upon Brown's evidence, Brown having pleaded guilty to the charge, that appellant was convicted, and this, being the evidence of an accomplice, ought to have been the subject of a warning to the jury. Moreover, the corroboration must be to a material fact. Appellant had been concerned with Brown previously in charges relating to coining offences, and this was alluded to during the trial. It was submitted that the learned Deputy-Chairman should have cautioned the jury to disregard any prejudice arising from the discovery of a previous conviction against the prisoner. (*John Lee* (1908), 72 J. P. 253; 24 T. L. R. 627; Crim. App. Cases, 5, above.) Appellant was never allowed to explain his connection with the coining business.

[Walton J.: I think it is a serious flaw in a summing up if it does not put the case for the prisoner to the jury as carefully as the case for the prosecution.]

Forder Lampard, for the Crown: What the learned Deputy-Chairman did was in the interest of the prisoner. The reference to a previous conviction having been made, the best thing was to stop it as quickly as possible.

Darling J.: Brown confessed to stealing the bag, and said he did it in concert with appellant. Even without Brown's evidence, there was a case against appellant. But Brown is called as a witness, and goes on to tell how he and appellant were at one time associated in coining offences. The appellant was not allowed to explain this. Brown had been sentenced to four years' penal servitude for coining, and care should have been taken to tell the jury that appellant's explanation had been checked in his own interest. This, however, would not be sufficient, as there was no warning to the effect that the evidence given was that of an accomplice. We think, however, with regard to the case of *Lee* referred to, that it is a peculiar case, and one, as the Lord Chief Justice said, not likely to be of much use as a precedent. It was different to the case before us now. It must not be taken as an authority that where something comes out at the trial, and the judge does not deal with it, that alone would be sufficient to

justify this Court in quashing it. However, in the present case we think the course adopted was most prejudicial to the prisoner, and that it brought about a miscarriage of justice.

1903
5 December.
William Warner.

Conviction quashed.

PATRICK CONCANNON.

Patrick Concannon.

Severity of sentence.

This was an appeal against sentence, leave having been granted by Mr. Justice Darling. Appellant was convicted of unlawful wounding, at Derbyshire Assizes on the 12th November, before Mr. Justice Jelf, and sentenced to five years' penal servitude. He had been convicted six times since 1899, twice for night poaching.

C. S. Magee for the appellant (under sect. 10 of the Criminal Appeal Act), who was not present. Appellant was present at a poaching affray. The constable, who was the person injured, tried to arrest another man named Pearce, who was also there, and Pearce, who struck a blow at the constable but missed him, only received fourteen days' imprisonment. Both appellant and constable had sticks, and it was submitted that as appellant did not go out equipped with the stick, which was a small one, for purposes of offence, and that, seeing there was a general scuffle, and a likelihood of some mistake, the sentence was excessive.

Edward Hart, for the Crown, was not called on.

WALTON J.: The evidence of the doctor is before us. It shows that the constable was badly hurt and incapacitated for a week. In the circumstances the sentence is not excessive.

Appeal dismissed: sentence to run from date of conviction.

SAMUEL CHADDERTON.

Samuel Chadderton.

Misdirection—Miscarriage of justice.

The applicant was indicted, under sect. 5 of 48 & 49 Vict. c. 69 (the Criminal Law Amendment Act, 1885), for rape, and tried before the Lord Chief Justice, at Shrewsbury on October 18th.

He was found guilty, and was sentenced to five years' penal servitude.

1908
5 December.
Samuel Chadderton

Hugo Young, K.C. (*A. Graham* with him), for the appellant, who was not present. The girl against whom this offence was committed was under sixteen years of age. There were three questions raised at the trial: (1) was there any connection at all? (2) if so, did she consent? (3) if so, had appellant reason to believe that the girl was over sixteen years old? The Lord Chief Justice directed the jury that the question of age was only raised at the last moment, and that the raising of it admitted connection. On the contrary, connection was never admitted by appellant, who also declared that the girl, who was a servant in his house, was engaged as being over sixteen, and her mother wrote to that effect. It was necessary to raise the question of age, as the jury might assume consent, although connection was denied.

Graham Mihcard, for the Crown, was not called on.

Pickford J.: The girl was just under sixteen. Upon the indictment two possibilities of conviction were open, (1) for rape, (2) for carnal knowledge of a girl under sixteen, and upon that charge, even if consent was proved, appellant could be convicted unless he could show that he had reasonable grounds for believing that she was under sixteen. The substantial defence was that there was no connection at all, but there were facts in her story which might raise in the jury's mind the question of her consent. Counsel for the defence put the case to the jury on both grounds: (1) whether there was any connection at all; (2) whether, if there was, it was by her consent, appellant having good reason to believe that she was over sixteen. The complaint against the Lord Chief Justice's summing-up is, in substance, that he directed the jury that the raising of the issue of age by questions put by the defence at the end of the prisoner's examination-in-chief was in law an admission that there had been connection. If his lordship had told the jury that, it would have been misdirection, but he told them nothing of the kind. Age is important in rape as to the measure of resistance. No question as to consent was put to the girl, but the prisoner was asked whether he had reason to think that she was over sixteen. Then the Lord Chief Justice interposed and said: "Consider your position: this new point may put me in a difficulty. Make up your mind which defence you will set up." Whereupon Mr. Graham said: "I know what my defence is, but I must put this to the jury."

1908
5 *December.*

Samuel Chadderton.

The passage most quarrelled with in the summing-up is: "Is it consistent that this question of age should be raised? It was not raised till the last moment, and, if there was no consent, it is immaterial." The learned judge never intended to suggest that the raising of the question of age was an admission of connection, for he left that very point to the jury. The questions as to the sheet submitted to the doctor were *primâ facie* directed to the question whether there was connection or not. He did not exclude that question, and his use of the word "consistent" did not mean that there were two things inconsistent in law and that one excluded the other, but meant: Would the prisoner, if he had any confidence in his first line of defence, have raised the second? That is the worst that can be said of the summing-up. The learned judge then left three distinct questions to the jury: (1) Was there a rape? (2) Was there connection with a girl under sixteen? (3) Was there an indecent assault? There was no misdirection.

Appeal dismissed.

Solicitors for the Appellant: *Carrane and Shawcross, Wellington.*

BEFORE

THE LORD CHIEF JUSTICE, MR. JUSTICE PHILLIMORE AND MR. JUSTICE WALTON.

JOHN JAMES FAIRBROTHER.

1908
11 *December.*
John James Fairbrother.

A finding of "provocation" on an indictment for murder does not necessarily reduce the offence to manslaughter—A judge is not bound in every trial for murder to direct the jury that they may find manslaughter.

This was an application (referred to the full Court by the single judge) for leave to appeal against a conviction for wife-murder.

The case was tried before Mr. Justice Ridley at Guildford Assizes on 27th November. The prisoner was found guilty, but the jury strongly recommended him to mercy on the ground that the act was unpremeditated, and that in the past he had received continuous and great provocation.

G. C. Whiteley for the appellant (under sect. 10 of the Criminal Appeal Act), who was not present. Leave to appeal upon the facts was asked for on the ground that the doctor's evidence was not satisfactory as to whether the wounds upon the woman were self-inflicted or not. Before the coroner the doctor gave in evidence that he thought the wounds might have been self-inflicted, and at the trial he contradicted that opinion.

[THE LORD CHIEF JUSTICE: The doctor made another examination after the inquest. His evidence at the trial was based on the result of that further examination, and therefore might differ from what he had previously stated.]

The verdict given could not be separated; the recommendation reduced the verdict to one of manslaughter. He cited *Gray* (1891), 17 Cox C. C. 299; C. C. R.

[THE LORD CHIEF JUSTICE: There they negatived an essential element of the offence.

WALTON J.: That would be a point of law, and leave to appeal was not necessary.]

1908
11 *December.*
John James Fairbrother.

It is true that manslaughter was not set up as an alternative defence, but the jury meant manslaughter.

[PHILLIMORE J.: No, or they would have said so.]

The LORD CHIEF JUSTICE: No leave can be given to appeal upon the facts. The doctor expressed contrary opinions, but he explained this by saying that he had made a further examination, which modified the conclusion at which he had first arrived. With regard to the point taken on the verdict, it must be remembered that there was no direction—and it was not necessary that there should have been—as to manslaughter, and that the case was one of murder or nothing. It was for the jury to find a verdict of guilty or not guilty of murder. Appellant could appeal against conviction as of right upon a point of law, but it was not for the Court to express an opinion with regard to that at the hearing of the present application. Appellant had been put in the box and told his story. The jury were in a position to accept or reject his version of the facts. Prisoners often in their evidence fill in the *lacunæ* in the case of the prosecution. The Court has been asked to say that "unpremeditated" meant not intentional, but it only meant that it was not an "act previously thought of and deliberated," but it did not mean that the act was accidental. The word, as used in the verdict, could only serve to strengthen the recommendation and not affect the verdict. The Home Secretary could take notice of the recommendation and of the finding as to provocation, his powers in accordance with sect. 19 being untouched by the Criminal Appeal Act.

Application refused.

George Lucas.

GEORGE LUCAS.

A conviction will not be quashed if the jury is properly warned against prejudicial evidence accidentally admitted.

Sentence may take into account a defence making unjustified imputations on the prosecutor.

This was an application referred to the full Court by Mr. Justice Darling for leave to appeal against conviction and sentence.

Appellant was convicted at Manchester Assizes before Mr. Com-

1908
11 *December.*
George Lucas.

missioner Tobin, on 28th November, of perjury, found guilty and sentenced to twenty months' imprisonment with hard labour.

Applicant had been the respondent in bastardy proceedings. The police court proceedings took place on 14th October, 1908, and by way of proving her case the complainant produced a number of envelopes which she alleged to be in appellant's handwriting. He examined the envelopes, and then stated on oath that they were not his and were never sent by him. The necessary corroboration, contradicting what he swore, was given at the trial for perjury by the girl's mother and an expert in handwriting.

McKeever for the appellant, who was not present. The opening of the bastardy proceedings by counsel for the prosecution on the trial for perjury prejudiced the hearing.

[PHILLIMORE J.: How else could the story be told?]

It was enough to say when and where he had been seen writing the envelopes. The witnesses called were not reliable; one was the suggested father of the child, and the girl had to admit that she had told lies in her evidence. Also it was submitted that the sentence was excessive, and was avowedly increased by the learned Commissioner in view of the defence, which undoubtedly imputed very wrongful practices to the girl, and suggested that she herself had written the letters to cover her guilty conduct with another man.

WALTON J.: It was clear that the learned Commissioner appreciated the nature of the bastardy proceedings, and corrected any prejudice which their accidental introduction might have created by warning the jury not to be influenced by them, as they could not be given in evidence against appellant. The whole case was before the jury and they heard the evidence, and therefore, nothing fresh having been said on the application, leave to appeal could not be given. With regard to the sentence, the Court was of the opinion that in the circumstances it was perfectly reasonable, though individual judges might hold different opinions on such a point.

Application refused.

Solicitor for the appellant—*T. W. Harris, Manchester.*

1908
11 *December.*
James Betridge.

JAMES BETRIDGE.

Fresh evidence—Mistaken identity.

This was an appeal, by leave of Channell J., against a conviction of false pretences. Appellant was indicted before the Chairman of West Kent Quarter Sessions on October 22nd, found guilty, and sentenced to twelve months' hard labour. Application was also made to call further evidence.

It appeared that the prosecutor, who was a miller, attended the West Malling horse fair in November, 1906. He had a horse which he had brought there to sell, and a purchaser was found for it by the prosecutor's servant, Wells. A bargain was struck, and the parties went to an inn to settle the account. The purchaser, describing himself as a large contractor carrying on business at Southampton, filled in a cheque for 14*l.*, and signed the name of "James Betridge" at the bottom of it. The cheque was presented in due course, but was returned marked "No a/c," and a note was sent with it to say that the book from which the cheque came was a book that had been stolen from one of the bank's clients on a racecourse. The prosecutor thereupon gave the police a description of the man who had written out the cheque at West Malling. The police searched for the man for two years, and eventually arrested appellant in August, 1908.

H. G. Rooth for the appellant, who was on bail and present. When appellant was arrested he said, "You know I am not the man. I was at the fair with Charlie Wood." Wood gave evidence that appellant on the day in question was helplessly drunk by one o'clock; the cheque was not signed till two o'clock. The prosecutor was asked if the purchaser was drunk, and replied that he did not notice that he was. If he was, this could not have escaped him. Against Wood's character nothing was suggested, and his statement, therefore, should be accepted. The prosecutor identified appellant as the man who signed the cheque; but his servant, Wells, who introduced the purchaser, and who would have had a better opportunity of noticing him, not only failed to identify appellant, but identified another man altogether, who was about 6 ft. high, whereas appellant was not more than 5 ft. 3 in., and was present in the room at the time of such identification. A great point at the trial made against appellant was that when before the justices appellant applied for a blank cheque, to fill it up

1908
11 *December.*
James Betridge.

and so shew the difference between his own handwriting and that on the cheque the subject of the charge. He was advised not to do this, but, as he insisted, a blank form was supplied, which he filled up at the dictation of the police inspector, in each case writing "Betridge." Now there was a James Betteridge, a contractor, at Southampton, and it was said that both cheques must have been filled up by the same person. But this did not follow, because, first, if appellant wrote the first cheque he would hardly propose to supply the prosecution with more proofs of his handwriting; secondly, the reason why he spelt "Betridge" in the specimen cheque was because that was how the inspector pronounced it in dictating. Finally, to the ordinary person the cheques would seem to be in different writings.

Detective-Sergeant *Holford* was called by leave of the Court, and examined by *Rooth*. In 1906 he was sergeant in charge at Peckham. He produced the "Police Gazette" of December 7th, 1906, in which appeared an advertisement for a man supposed to be James Betridge, and described, *inter alia*, as 5 ft. 6 or 7 in. tall; this description was supplied to the police by the prosecutor. The description given to him by the prosecutor (and by witness handed on to the local police) suggested another man named Barker to his mind. The description given was exactly the description of Barker, as he had been told by Thomson (one of Barker's gang), who was a notorious frequenter of horse-fairs and a man of bad character, while it was totally irreconcilable with the appearance of appellant, whom he had known for years. Appellant was always known as Groves. There was a very considerable difference in the heights of the two men.

Methven, for the Crown, cross-examined the witness, who admitted that appellant was an associate of Barker's. The case was tried at great length, but the Director of Public Prosecutions did not prosecute. The false pretence consisted in the fact that appellant personated a contractor in a large way of business, of Southampton, named Betteridge, and signed the cheque as such, but with the spelling "Betridge." Prosecutor had identified a man who was at Malling Fair on the day in question, and who knew Betteridge and had had horse-dealing transactions with him. When before the magistrates, appellant (who was undefended) insisted upon filling in a cheque form. He signed that "James Betridge." The real contractor at Southampton signed his name

1908
11 *December.*
James Betridge.

Betteridge. The same mis-spelling appeared upon both cheques, which also corresponded in various other ways, and therefore it must have been appellant who signed the cheque at West Malling Fair. An expert proved that the handwriting was similar. The only discrepancy in the identification of appellant by description was the fact that he was not so tall as he was described to be.

The Lord Chief Justice: Had no fresh evidence been called the Court could not have interfered with the conviction. There was evidence that appellant was at the fair on the day in question, and there was also evidence of identity before the jury. The case brought out once again the fact that if justice were to be done, it was necessary for the Court to have power to order a new trial. Holford's evidence had been obtained after trial. Holford had said that he received the description a fortnight after the offence had been committed. He at once thought that it was a description of Barker, and he knew both Barker and appellant. The description was of a man about five feet six inches, stout, with dark complexion and moustache. Appellant was a very small man indeed, and whatever other indications tallied, no one could call him tall. This was confirmed by Thomson, one of the gang. Though appellant knew the real Betteridge, the case could not now be dealt with on the ground that appellant was one of a gang. Wherever the description came from, it pointed to Barker and not to Groves. There was evidence, though not of a very credible witness, that Barker was at the fair. The description was given shortly after the fraud, but the arrest was not made for two years. It would not be safe to let the conviction stand.

Conviction quashed.

Solicitors for the Appellant—*Curtis & Co.*

E. Gowlett, *alias* E. Woodford.

E. GOWLETT, *alias* E. WOODFORD (*a*).

Fresh evidence—Alibi.

Ralph Thomas, for appellant (under sect. 10 of the Criminal Appeal Act), called and examined three witnesses.

Haers: Did not know that appellant was at the lodging-house. Witness took a microscope—the subject of the charge—to the

(*a*) See p. 204, above.

lodging-house at seven o'clock in the morning. He saw appellant having breakfast there with another man, both of whom said they were going to Covent Garden. They went out, and he did not see them again. Appellant never saw the microscope at all. Witness met appellant in Dartmoor Prison years before the present affair, and had not seen him since that time. There was another man at the lodging-house very much like appellant.

Chaffin gave evidence in support of the *alibi*. October 5th was the Day of Atonement and a holiday for all Jews. He was at Covent Garden Market and was with Gowlett and Manton, the witness called at the Sessions, from 11 till 2 o'clock.

Betjemann: First saw appellant at eleven o'clock, and, except for half an hour, was with him and Chaffin and Manton till two.

Appellant was also called and said that he slept at Caledonian Road on 4th October. Witness deposed to rising between 8 and 9 o'clock on 5th October. He did not see what Haers had in the kitchen. At 9.45 he left the lodging-house and went to a public-house near Covent Garden. Later on he met a friend and went to another public-house to have a drink with him. Betjemann came into that public-house while he was there and they all had drinks together. Witness said that he knew one of the detectives, but that neither of them knew him. When witness left the lodging-house he went straight to Covent Garden. In cross-examination he said he could walk from Covent Garden to Caledonian Road in twenty minutes. It would be quicker to go by the tube railway, but he never used that.

[The Lord Chief Justice: How did it happen that these witnesses were not called at the trial?]

Chaffin, recalled, explained that he had been asked to give evidence at the police court, but his father was taken ill, and he could not go in consequence, and that his mother was dying when the case was heard at Sessions.

Thomas submitted that the fresh evidence established the *alibi;* also that the summing-up was not fair.

B. A. Smith, for the Crown, after cross-examination of the witnesses: The evidence of the detectives called at the trial was very strong. One of them knew appellant well, and both had had ample opportunity of seeing him at a distance of only thirty yards in the broad daylight on at least three occasions on the day in

1908
11 *December.*
E. Gowlett, *alias* E. Woodford.

question. Again, Haers and Chaffin swore that appellant wore a cap and jacket, Manton that he had on a hat and coat.

Detective *Powell* was called and explained that he did not go to the lodging-house to arrest appellant as he knew appellant's friends would warn him. He thought it better to wait and take him outside.

Thomas submitted it was a strong point in appellant's favour that although he was seen by Powell on 8th October, he was not arrested till the 9th.

The Lord Chief Justice: The Court is not satisfied with the explanation given for not calling at the trial the evidence produced on the appeal. There was no dispute as to the identity of the man, as the police knew the appellant very well. Appellant had to account for his movements on the day in question, and though he sought to prove an *alibi*, at the trial he did not go into the box to establish it. The jury had the question of the *alibi* before them.

Appeal dismissed.

Edward Dunleavey.

EDWARD DUNLEAVEY.

On a charge of false pretences, guilty knowledge must be proved beyond reasonable doubt.

This was an appeal against conviction and sentence, leave to appeal having been given by Mr. Justice Channell.

Appellant was convicted of attempting to obtain 25*s.* by false pretences. He was indicted at Salford Borough Quarter Sessions, before the Recorder, on November 6th, found guilty, and sentenced to eighteen months' imprisonment with hard labour.

Appellant, with a man named Owen, went into a public-house, the landlord of which was known to Owen. The landlord took appellant and Owen into a room and treated them to drinks. Appellant thereupon produced a ring and offered to sell it to the landlord for 25*s.* The ring was represented to be gold, and in order to test whether the stone which was set therein was a diamond, as to which appellant said he was doubtful, appellant offered to scratch a tumbler with it, and so prove its genuineness. The landlord was suspicious, and sent his wife round to a neigh-

1908
11. *December.*
Edward Dunleavey.

bouring jeweller's to have the ring tested. The wife came back shortly afterwards, having learnt that the ring was wholly imitation, and appellant was immediately arrested.

F. T. R. Bigham for appellant (under sect. 10 of the Criminal Appeal Act) who was present (*a*). The appeal is justified on the ground that there was no reasonable evidence that appellant had any guilty knowledge that the ring was anything different from what he represented it to be. Appellant's story was that he picked the ring up in the street. He thought it was gold, but from the very first he said he was not sure what the stone was, and that was why he wished to test it on a tumbler. There was no evidence of system and nothing to shew that he did not believe what he said. See *Francis*, (1874) L. R. 2 C. C. R. 128; 43 L. J. M. C. 97; 30 L. T. 503; 22 W. R. 663; 12 Cox, C. C. 612. A letter purporting to be written by appellant's mother was put in for the prosecution which appellant had produced, and which was alleged by the prosecution to be a forgery. The Recorder called attention to this letter in summing up, and it was submitted that it was not for the jury to determine the genuineness of that document.

Rushton for the Crown. There were suspicious circumstances in the case, Owen having told the landlord that appellant came from Birmingham, when in fact he was working in Manchester at the time, which statement, though made in appellant's presence, was not contradicted by him.

PHILLIMORE J.: The conviction could not stand. Appellant was indicted for attempting to obtain money by false pretences, and though some of his statements were open to suspicion, the conviction could not stand, and would have therefore to be set aside upon the ground that there was no evidence upon which the jury could have said that appellant, when attempting to dispose of the ring, believed that it was a sham.

Conviction quashed.

(*a*) See p. 212, above.

BEFORE

MR. JUSTICE DARLING, MR. JUSTICE PHILLIMORE AND MR. JUSTICE WALTON.

1908
12 *December.*

Harold Burnett Gylee.

HAROLD BURNETT GYLEE.

Manslaughter—Negligence—An honest belief in a state of things, if it induces one to take a risk, may in itself be criminally negligent.

Sect. 14 (1) *of the Criminal Appeal Act.*

This was an appeal on a point of law against a conviction of manslaughter. Application for leave to appeal on the facts had been referred to the full Court by Mr. Justice Darling.

Appellant was indicted at Lewes Assizes on the 12th November, before Mr. Justice Grantham, found guilty and sentenced to three months' imprisonment in the second division.

Appellant, who was an accountant in the employ of the Minerva Motor Car Company, was driving one of the company's cars to Worthing. He had with him three ladies and a gentleman. On coming to four cross-roads, the approach to which was guarded by the usual danger signal, a bicycle was seen about to cross the direction which the car was taking. The bicycle was being ridden by a man named Denman, who was carrying his sister, a servant-girl of about seventeen years of age, on the step. It appeared to appellant that when Denman saw the car approaching, he made as though he would turn the bicycle so as to go in the same direction as the car. Appellant then being in the middle of the cross-roads just saw the bicycle at a distance of about eighty feet. All that is known after that was that Denman, according to his evidence, felt a jerk, was thrown over the handle-bars, and when he picked himself up, he saw that his sister had been caught by the car, and her body was underneath the wheels some 34 feet away, where the car had pulled up. Within half an hour of the accident the girl died of her injuries.

Marshall Hall, K.C. (with him *Rowand Harker*) for appellant, who was not present. The case for the defence was never put to the jury at all; the law was not properly put to the jury; some evidence was admitted which should have been excluded. The

1908
12 *December.*
Harold Burnett Gylee.

fact that Denman felt a jerk was consistent with the view that the girl's muslin skirt caught in the back wheel of the bicycle, or that the girl, seeing the car approaching, became frightened, and, jumping off, in some way fell in front of the wheels of the motor. There was evidence to prove that Denman guided his machine to the near side of the road, and that appellant swerved out to the off side in order to pass safely the bicycle and its human freight. Objection was taken at the trial as to the way the policeman, who produced the plan, gave his evidence. He had gone to the scene of the accident with Denman, who had pointed out to him the various places, and then, when he came to Court, he took the plan and gave in evidence what he had been told by Denman. This was hearsay evidence, and should have been excluded. It was submitted that if appellant, when approaching the cross-roads, was not going at a pace which, having regard to his knowledge of the road, was culpably negligent, and if he had honestly believed that Denman was turning to go in the same direction as himself, then what happened was accidental, and appellant was not responsible. The learned judge in summing up had told the jury that appellant was not an experienced driver, but the evidence was quite the other way. The jury were told that if appellant were going too fast, it was immaterial whether the girl jumped off or not, because if she were frightened into doing it by the pace which the car had attained, then the driver of the car was responsible for what occurred. It was submitted that this was not a correct statement of the law.

Raven and *Sutherland Graeme* for the Crown were not called on.

DARLING J.: In this case there could be no leave to appeal upon the facts. It was suggested that some sentences in the summing up amounted to a misdirection. The Court was of the opinion that there had been no misdirection at all. With regard to the evidence, the Court was not going to lay down rules as to how plans should be proved at the trial. The policeman gave evidence as to what had been pointed out to him, but it had to be remembered that Denman was himself in court and gave evidence. There was no miscarriage of justice. The statement of law suggested by appellant to be the correct one lacked this qualification, that appellant might have been unjustified in coming

1908
12 *December.*
Harold Burnett Gylee.

to the conclusion which he did. It was no defence to prove that a man was honestly negligent.

Appeal dismissed.

Marshall Hall asked that sentence should run from conviction, as, since appellant was in the second division, the special treatment allowed to appellants in prison under sect. 14 (1) of the Criminal Appeal Act was no mitigation of sentence, there being practically no difference between imprisonment in the second division and such treatment.

The Court, however, stated that it was informed by the Home Office that there was a distinction. But as the hearing of the appeal, though in the list, had been delayed eight days, sentence would run from the first of those days.

Sentence to run from the date of the appeal being in the list.

Solicitors for the appellant—*Amery-Parkes, Macklin & Co.*

BEFORE

THE LORD CHIEF JUSTICE, MR. JUSTICE DARLING AND MR. JUSTICE PICKFORD.

DANIEL BURKE.

1908
18 *December.*

Daniel Burke.

Appeal solely on the ground that "verdict is against the weight of evidence."

This was an application, by leave of the single judge, for leave to appeal against conviction. Appellant was convicted of the murder of a woman with whom he lived, before Mr. Justice Sutton at the Central Criminal Court on the 10th December, 1908, and sentenced to death (with a strong recommendation to mercy).

Boyd for the appellant (under sect. 10 of the Criminal Appeal Act), who was not present. Application is made upon the ground that the verdict was against the weight of evidence. There was evidence to shew that when the injuries were inflicted, appellant had no intention of killing the woman, or even of causing her bodily harm at all. There had been no quarrelling between appellant and her, and the time immediately previous to the infliction of the wounds had been passed together in apparent friendliness. Appellant was suffering from the effects of drink at the time, and had been medically treated some three years before for a tumour on the brain.

The LORD CHIEF JUSTICE: There is no dispute as to the woman's death being caused by acts of appellant. Some restriction must be placed on appeals based solely on the ground that the verdict is against the weight of evidence, and where no misdirection is suggested. The recommendation to mercy would receive attention from the Home Secretary, whose powers were left untouched by the Criminal Appeal Act. The Court are of the opinion that the proper direction was given.

Application refused.

1908
18 *December.*

Walter Westacott.

WALTER WESTACOTT (*a*).

Prejudicial evidence pointing to other offences by the accused may be admissible.
An improper question is not necessarily a miscarriage of justice.
Proviso to sect. 4 of the Criminal Appeal Act—"substantial miscarriage of justice."

St. Gerrans for appellant, who was not present. One form of the charge was obtaining the sum of £2 : 2*s* by false pretences. The statement made to Eccles, and that as to the court-martial proceedings, were matters to which no reference should have been made at the trial. With regard to the statement made to Eccles, the rule must be observed which forbids juries to be told about any statement made by a prisoner which would shew that he had committed some other offence than that, or those, before the Court.

[DARLING J : Applicant owed money on squadron and sergeants' mess accounts. How are we to know for which account he desired to borrow the money from Eccles ?]

Appellant was indicted with regard to a receipt connected with the sergeants' mess accounts, whereas the court-martial proceedings were in respect of deficiencies in the squadron accounts. Therefore the court-martial proceedings ought never to have been mentioned at all, and reference to them seriously prejudiced appellant at his trial.

[DARLING J.: But *you* brought out all the facts about the court-martial. It is sometimes best for counsel to say nothing, but to come here with a point of law.]

I was bound to go on and show that the court-martial had nothing to do with this case. I could do nothing else. All this was evidence to character. Even before the Criminal Law Amendment Act, reference to a prisoner's bad character was not allowed, unless such person had put his or her character in issue. The questions complained of should not have been put by the prosecution. Such questions must lead to a miscarriage of justice.

(*a*) See p. 216, above.

1908
18 *December.*
Walter Westacott.

[The Lord Chief Justice: This Court has already ruled that the putting of a question which ought not to have been asked is not necessarily a miscarriage of justice, and in this case the cross-examination on appellant's behalf did away with any prejudice that the examination-in-chief might have caused.]

The evidence, apart from the statement to Eccles and the reference to the court-martial proceedings, was very weak. It would be most dangerous to relax the old rule as to the exclusion of evidence of a prisoner's bad character when character was not in issue. From the way the trial had been conducted, it followed that there must have been a miscarriage of justice.

Temple Cooke for the respondents: I did not, in fact, open the court-martial to the jury. The first reference to it was when, in opening appellant's statement to Eccles to the jury, counsel objected to it, on the ground that it related to another matter dealt with by the court-martial. That was the first reference to the previous proceedings against appellant.

St. Gerrans: No; my learned friend is mistaken. The objection made contained no reference to court-martial. [Question put by prosecution cited from the shorthand note in which word "court-martial" first appears.] It was unlikely that counsel for the prisoner should allude to former proceedings against his client.

[The Lord Chief Justice: The onus on the prosecution is exactly where it was before the Act.]

Darling J.: The Court need not decide who first mentioned the word "court-martial." The present appeal is upon a point of law, namely, that the learned judge received evidence which ought to have been excluded, thereby bringing about a miscarriage of justice. Appellant was a quartermaster-sergeant in the 16th Lancers, and had charge of the squadron and sergeants' mess accounts. It was with regard to the latter that this prosecution had taken place. There was evidence that appellant had told Eccles that he was 60*l.* out in his squadron accounts. Counsel for appellant said that that evidence ought not to have been received. In the opinion of the Court that evidence was clearly admissible for the purpose of shewing that appellant

1908
18 *December.*
Walter Westacott.

was in need of money at the time. With regard to the reference to the court-martial proceedings, there was a conflict between counsel as to who first introduced the subject. It might be assumed, if desired, that such reference ought not to have been made, and it was urged that therefore appellant was entitled to have the conviction set aside under sect. 4 of the Act. But having regard to the fact that the court-martial proceedings were robbed of their significance by cross-examination, and that the learned judge pointed out to the jury that they had been quashed, it could not be said that their introduction had brought about a miscarriage of justice. In the opinion of the Court the case fell within the proviso to sect. 4 of the Act. In *Makin* v. *Attorney-General for New South Wales* (1894, A. C. 57; 63 L. J. P. C. 41; 69 L. T. 778; 17 Cox, C. C. 704; 58 J. P. 148; 6 R. 373), Lord Herschell dealt with a somewhat similar proviso in sect. 423 of the (colonial) Criminal Law (Amendment) Act, viz., "Provided that no conviction or judgment thereon shall be reversed, arrested, or avoided on any case so stated unless for some substantial wrong or other miscarriage of justice." With regard to this proviso, the Court was of the opinion that the concluding passage of Lord Herschell's judgment well illustrated the proviso to sect. 4 of the Criminal Appeal Act. It runs: "Their Lordships desire to guard themselves against being supposed to determine that the proviso may not be relied on in cases where it is impossible to suppose that the evidence improperly admitted can have had any influence on the verdict of the jury, as, for example, where some merely formal matter not bearing directly on the guilt or innocence of the accused has been proved by other than legal evidence."

Appeal dismissed.

Solicitors for Appellant—*Eve and Clinton, Aldershot.*
Solicitor for the Respondents—*E. Kempson, Farnham.*

THOMAS CLARENCE PITCHFORTH.

1908
18 *December*.

Thomas Clarence Pitchforth.

32 & 33 *Vict. c.* 62 (*The Debtors Act*, 1869), *s.* 12—"*Intent to defraud.*"

This was an appeal against conviction, leave having been granted by Mr. Justice Darling, and also an application for leave to call further evidence.

Appellant was indicted at Leeds Assizes, before Mr. Justice Pickford, on the 18th November, under sect. 12 of the Debtors Act, 1869.

He was found guilty, and sentenced to five months' imprisonment in the second division.

Under sect. 12 of 32 & 33 Vict. c. 62 (The Debtors Act, 1869), "If any person who is adjudged a bankrupt, or has his affairs liquidated by arrangement after the presentation of a bankruptcy petition against him . . . . quits England, and takes with him . . . . any part of his property to the amount of twenty pounds or upwards, which ought by law to be divided amongst his creditors, he shall (unless the jury is satisfied that he had no intent to defraud) be guilty of felony. . . ."

Appellant went to America in October, 1907, at which time, by his own admission, he had in his possession £150 (at least). He had committed an act of bankruptcy on the 24th September preceding, and the prosecution alleged that he had been served with a bankruptcy petition on October 10th, at 41, Burley Road. He traded at three other shops, to which goods had been supplied, but his case was that he had given up the tenancy of these shops before the meat in question was delivered there. He denied ever trading at 41, Burley Road, at all. He sailed on the 12th. His principal indebtedness arose out of transactions with two firms one in London and one in Leeds. The former had got judgment for their debt in his absence on a previous visit to America in July—August, 1907. The goods in this case had been ordered partly by telegrams and partly by a letter. One of the partners swore that the letter was in appellant's handwriting, but appellant denied this. It was addressed with a printed heading, "41, Burley Road," and the other three shops were printed as "Branches." Another witness swore that this letter was in appellant's writing, which was exactly the same as that of his admitted cheques. A bank clerk,

1908
18 *December.*
Thomas Clarence Pitchforth.

however, thought it was not in his hand. Appellant said that the business there was his mother's, and never his—though all the meat supplied there was, he admitted, paid for by cheques drawn by himself. A great many of those cheques were produced at the trial. When sued by the Leeds company, the other creditor, appellant's mother had got judgment on the ground that the business at 41, Burley Road, was not hers at all. She alleged that the goods supplied by that company were ordered by appellant on the telephone, and at an interview. Mr. Seed, the Leeds agent of the company, deposed to this effect, and said that he recognised appellant's voice, and that it was he who had the interview with appellant, whom he knew well and had traded with for two years. The delivery of the goods at appellant's shops was proved. It was sought to discredit this evidence by an affidavit (under Ord. XIV.) which Seed had sworn in the proceedings against the mother, in which he relied on statements made to him by appellant's father, after appellant had absconded, that the business was really the mother's. Both Seed and appellant gave evidence at the trial.

As to the service of the bankruptcy petition on October 10th, England, the clerk who served it, gave in the bankruptcy proceedings October 9th as the date, but at the police court corrected it to the 10th. At the trial he adhered to the 10th, and gave reasons for his mistake. A lad was also called to prove that England had called the same night at the lad's employer's (a shop adjoining 41, Burley Road), and made enquiries about appellant and his family. At the trial this lad hesitated, and suggested the date might have been a week later than the 10th. Appellant denied having been served at all. England swore that he had answered his enquiry that he was T. C. Pitchforth.

Cuthbertson for appellant (under sect. 10 of the Criminal Appeal Act), who was on bail. A witness named England proved at the trial that a petition was served upon appellant. The evidence with regard to that was challenged on account of the uncertainty of this witness, who was supposed to have served the petition, as to the actual date of service. A boy was called to corroborate him, but utterly failed to do so, putting the date of service about a week later than the time to which England deposed. The evidence, in the nature of an alibi, which was now obtainable might have been given at the trial, but counsel for the prisoner thought the case for the prosecution too weak to need rebutting.

1908
18 *December.*

Thomas Clarence Pitchforth.

[The LORD CHIEF JUSTICE: Witnesses are only allowed to be called when additional facts have come to light since the date of trial.

PICKFORD J.: The confusion as to dates was apparent when the case was before the magistrates.]

There were two counts in the indictment, but the second only was proceeded upon, namely, the count charging appellant with having left the country after a petition had been served upon him with money amounting to 150*l.*, the property of his creditors. Appellant left England for America on the 12th October, 1907, and returned on the 21st April, 1908. The defence at the trial was that there was no intent to defraud, as appellant had no knowledge of the bankruptcy proceedings, and that the property in question was not divisible amongst the creditors of the prisoner. Two debts were attempted to be proved. The first arose out of orders alleged to have been sent by appellant. These telegrams were merely signed in the name of Pitchforth, and it was shewn that appellant's mother, and other relations, carried on the same kind of business as appellant was supposed to have done, namely, that of a butcher, and the telegrams might have been orders from them. The second alleged debt was supposed to have arisen from orders given by letters from appellant, but the handwriting was never proved to have been that of appellant. A witness named Seed, of a firm of wholesale butchers, gave in evidence that the person to whom he gave credit was appellant's mother. Orders were supposed to have been sent from appellant's premises at Burley Road, but the receiver never attempted to include these premises among the assets of appellant.

Bruce Williamson, for the Crown, was not called on.

The LORD CHIEF JUSTICE: The Court is asked to set aside the verdict of the jury on the ground that it could not be supported by the evidence, and that there had been a miscarriage of justice. But the jury at the trial were cautioned with regard to acting against the weight of evidence. The important witnesses were Seed, England and appellant himself. With regard to Seed, he proved that there were letters sent from the Burley Road premises, and he proved that appellant admitted to him that he was liable

1908
18 *December.*

Thomas Clarence Pitchforth.

for meat supplied to him. Seed's evidence was not consistent with that given at the previous proceedings, but the jury were cautioned with regard to it. The same applies to England. Appellant gave his own story, and said he was only agent for his mother, but the jury were justified in not accepting his statement. He said that he disposed of three shops, but that the Burley Road premises belonged to his mother. He admitted that he paid for the meat supplied, but said he was not responsible for those payments, as they were made on his mother's behalf, from whom he had received the cash. It was for the jury to consider the evidence, they having been duly cautioned with regard to it.

Appeal dismissed.

Fanny Prince.

FANNY PRINCE.

Severity of sentence of detention in an Inebriates' Home.

This was an appeal from an order of Mr. Justice Darling refusing legal aid; the same learned judge had granted leave to appeal against sentence.

Appellant was convicted under sect. 1 of 57 & 58 Vict. c. 41 (the Prevention of Cruelty to Children Act, 1894), before the Recorder at Walsall Quarter Sessions on the 19th November, 1908, and sentenced to twelve months' hard labour, followed by three years' detention in an Inebriates' Home. Appellant appeared in person.

W. B. Campbell (for the National Society for the Protection of Women and Children) said that if the Court thought fit to reduce the sentence in any way, the Society would make no objection. It was not a case where the cruelty had been gross or extraordinary. On the other hand, the authorities of the Inebriate Homes do not care to take inmates for less than three years, as they had not sufficient opportunity for a permanent reclamation. The prisoner was not represented at the trial.

The Lord Chief Justice: The sentence in this case is extremely severe. No doubt the learned Recorder felt that the only way in which to reform appellant would be to keep her under restraint for a considerable time. The Court, while it was

most anxious this result should be attained, feel that the sentence cannot stand. Appellant must serve the twelve months' hard labour, but be detained in a home for one year only after the expiry of the twelve months. The time will run from the date of conviction.

1908
18 *December.*
Fanny Prince.

Sentence reduced.

Solicitor for the Respondents—*W. J. Trehaine.*

FREDERICK PAYNTER.

Frederick Paynter.

Money obtained under a contract for sale or return, if induced by misleading statements, may be money obtained by false pretences.

This was an appeal against conviction, and also an application for leave to appeal upon facts, which was referred to the full Court by Mr. Justice Darling.

Appellant was convicted before the Recorder, at the Central Criminal Court, on November 6th, of obtaining money by false pretences, found guilty, and sentenced to twelve months' hard labour.

It appeared that appellant, who had carried on business at Battersea and Torquay for some eighteen years, was in the habit of putting advertisements in the papers inviting the public to apply to him and he would give them spare time employment, to be paid for in proportion to amount done. The nature of the work to be undertaken was represented to be writing work, though whether it were merely mechanical writing, or composing and writing, did not appear. When a person answered the advertisement, applying for the work, he received a circular which appellant printed, setting out that, as a qualification for undertaking the work, two shillings must be deposited for requisites, which in reality were worth four shillings. The two shillings having been sent, another circular was received, drawing attention to some forms and an illustrated catalogue which were enclosed. A fountain pen was sent with this circular, and the applicant was required to fill up these forms with his own name and address and to send them to any friend he could procure, who was willing to apply to

1908
18 *December.*
Frederick Paynter.

appellant in the same way as the applicant had done—in which event applicants would receive two shillings in respect of every pen sold, and would get the two shillings deposit returned. The object of getting applicants was in order to sell various articles —fountain pens, jewellery, &c.—which appellant supplied, the applicant getting a 50 per cent. commission on the sales.

George Elliott (with him *Stephen Low*) for appellant, who was present. The learned Recorder misdirected the jury in not telling them distinctly that the evidence for the prosecution did not disclose the offence with which appellant was charged. There was a postcard sent, if complaint was made, which contained an offer to refund the two shillings if the applicant was dissatisfied with the pen and the terms of the offer. This was never put to the jury by the learned Recorder. In every case the pen was sent, and although it was left to the jury to say whether there was a proper business or not, it was not left to them whether the goods were sent on sale or return. It was not alleged that appellant had ever failed to return a deposit if demanded.

Leycester, for the Crown, was not called on.

Darling J.: Appellant carried on a business in which he advertised in the papers for persons who were willing or desirous to undertake work which involved writing. Each applicant had to go through an elaborate system to sell a pen for four shillings which cost originally sevenpence half-penny with five per cent. off. It was obtaining money by false pretences for the reason that applicants received something entirely different from what they were led to expect. If there were no intent to defraud, appellant was not guilty, but he knew very well that very few people would bother to write for their money, having discovered that the thing was a hoax. In fact, only 1,251 out of an immense number of applicants—nearly 9,000 in twelve months—did so apply, and this was doubtless the contingency which appellant foresaw. He therefore intended to defraud the persons likely so to abstain from demanding the return of their deposits.

Appeal dismissed.

Solicitors for Appellant: *Hanne & Son, Battersea.*

PERCY ALFRED MORTON.

1908
18 *December.*

Percy Alfred Morton.

Severity of sentence—The degree of guilt may be reduced by the drunken condition of the accused at the time of the offence.

This was an appeal against sentence, leave having been granted by Mr. Justice Darling.

Appellant was convicted of burglary before the Chairman at Middlesex Sessions, on the 30th November, 1908, and sentenced to twelve months' hard labour.

It appeared that appellant, having removed his boots, climbed through a window, and so obtained entrance into a house.

Appellant, who appeared in person, alleged that he did not know what he was doing at the time, as he was under the influence of drink.

Safford, for the Crown, was not called on.

Pickford J.: Appellant was found guilty of burglariously entering a house with his boots off. He was under the influence of drink at the time, and though that does not excuse what he did, it affects the guilty intention which he must have had. The sentence of twelve months' hard labour was excessive, and would have to be reduced to six months' hard labour, and this to run from date of the conviction. The Court does not wish in any way to express an opinion conflicting with that of the justices with regard to the serious nature of the crime of burglary.

Sentence reduced.

JAMES SMITH.

James Smith.

Appeal in writing.

This was an appeal against conviction, on a point of law, and, by leave of Darling J., on a question of fact.

Appellant was convicted of being at night in possession of burglar's implements, without satisfactorily accounting for them. He was indicted at Kingston Quarter Sessions, before the Deputy-

1908
18 *December.*
James Smith.

Chairman, on 30th June, 1908, found guilty, and sentenced to twelve months' hard labour.

It appeared that appellant was found with a putty-knife and bunch of skeleton keys in his pocket. He first of all said he was a painter, and then accounted for the skeleton keys by saying they were only master-keys, and that he was a locksmith. The latter explanation was not left to the jury by the Deputy-Chairman, although appellant himself addressed the jury upon it.

Appellant, who was not present, was unrepresented.

Bridgewater, for the Crown, was not called on.

The Lord Chief Justice: The Court has carefully read the papers, and come to the conclusion that there is no ground for the appeal.

Appeal dismissed.

Arthur John David Brann.

ARTHUR JOHN DAVID BRANN.

Slight misdirection or improper admission or rejection of evidence is not sufficient ground to quash a conviction, unless there has been some "substantial miscarriage of justice."

This was an appeal against conviction, on grounds of fact, leave having been granted by Darling J, and on a question of law; and also an application for leave to call further evidence.

Appellant was convicted of stealing four bags and hold-all. He was indicted at the Middlesex Sessions, before the Deputy-Chairman, on the 30th November, found guilty, and sentenced to twenty-one months' hard labour.

It appeared that appellant sent a man named Parker to a shop in Oxford Street belonging to a dealer in bags and trunks. The prosecutor would not let Parker have any goods, and appellant, being informed of this, himself went round to the prosecutor's shop in the evening. He picked out articles to the value of 8*l*. He asked that the things might be sent round to his lodgings, when he would pay on delivery. The prosecutor had, previously to that, refused to accept appellant's cheque in payment. A man named Kelly took the various articles, namely a bag and a hold-all, round to appellant's lodgings. When Kelly arrived, he found appellant

1908
18 *December.*
Arthur John David Brann.

about to start for Ireland. Appellant asked Kelly if he could give him change for a 10*l.* note, but Kelly could not. Appellant then said he would get change, and rushed out of the house, saying that he would miss his train if he did not go at once, and that his landlady would look after the purchases and be responsible for them. Kelly followed appellant to a station, and subsequently to Euston. Appellant missed the train and spent the night in London, where, according to his story, he disposed of the note he was alleged to have in his possession. Kelly returned to appellant's lodgings, and spent the night walking up and down outside. Appellant returned early next morning, and finding Kelly still there, sent him on a bogus errand. As soon as Kelly's back was turned appellant put all the bags on a truck, and was proceeding to remove them to the station when Kelly returned and took possession of them.

G. L. Hardy, for appellant (under sect. 10 of the Criminal Appeal Act), who was present, submitted that there was improper admission and rejection of evidence, and misdirection by the Chairman. The evidence went to prove that when appellant ordered the goods he intended to pay for them. He had a small banking account and sufficient money to pay for what he had bought, and had had a previous transaction with the prosecutor's firm. He was obliged to leave his lodgings in a hurry, but he left the goods in charge of his landlady, who agreed to take care of them for him. It was true that appellant was about to take the bags with him to the railway station the next morning, but when accosted he said he was willing to return them, if an opportunity was given him to remove his things which had been placed in the bags. Appellant's case was never put to the jury. The verdict was against the weight of evidence.

Roome, for the Crown, was not called on.

The Lord Chief Justice: If appellant had really desired to change the note which he said he possessed, in order to pay for the bags, Kelly could have got it changed for him. The jury came to the conclusion that appellant obtained the articles by a trick, and the summing up must be considered in the light of the way the case was fought at the trial.

Appeal dismissed.

Solicitor for the Appellant—*J. H. Hope.*

1908
18 *December.*
Max Dalloz.

MAX DALLOZ.

A jury is entitled to infer that an accident is due to furious driving where there is evidence that the speed was excessive a few minutes before and after the accident.

This was an appeal against conviction on a point of law, and an application, referred by Darling J. to the full Court, for leave to appeal on the facts; and an application to call further evidence.

Appellant was convicted of manslaughter.

He was indicted at Guildford Assizes on the 11th November before Mr. Justice Ridley, found guilty, and sentenced to twelve months' hard labour.

It appeared that appellant was a chauffeur driving a car from London to Southampton, and when between Worpleton and Guildford he was seen to be going at racing speed. Between these places he passed a field where some young boys, including the deceased, were playing cricket, and a few minutes later the latter, who had run out of the field, was found lying on the off-side of the road, suffering from injuries which could have been caused by a motor-car, and from which injuries he died.

Evidence was given to shew that when the motor was stopped at Southampton indentations were found on the off fore mud-guard and lamp of the car. Appellant, who was arrested at Southampton, said he had had no accident at all.

Nolan for the appellant, who was not present. There was no evidence on which the jury could convict. There was no direct evidence of accident at all. There was no evidence that the accident was caused by any negligent driving of the car. The entrance to the field was so placed that anyone coming along the road would not see anyone coming out of the gate until he was close upon him. It stood 24 ft. 9 in. back from the road, which was fenced by a hedge 79 ft. long, and after that by a railing 41 ft. long. Thus, as the boys could only see the car through the railing, deceased must have run at least 24 ft. 9 in. while the car covered less than 120 ft. The evidence being that the boy had rushed out on to the road as the car was passing, it was equally consistent with his having collided with the car in such a manner that, without any negligence, it would have been impossible for the driver to avoid the accident. He might have collided with

1908
18 *December.*
Max Dalloz.

the rear part of the car. The indentations were of little importance, as evidence at the trial showed that they had been made some time previously. Counsel referred to *Wakelin* v. *L. & S. W. Rail. Co.* (1886, 12 App. Cas. 41; 56 L. J. Q. B. 229; 55 L. T. 709; 35 W. R. 141; 51 J. P. 404).

Kenrick, for the Crown, was not called on.

DARLING J.: It is impossible to say that there was no evidence to justify a conviction. A witness, standing in a greenhouse near to the spot where the accident happened, saw the car go past at so great a speed that the witness ran to look after it as it went down the road. If the deceased boy, as was suggested, himself ran into the car, appellant must have been criminally negligent not to have seen him. There was evidence that the schoolmaster of the place heard a noise as if brakes were being put on. That looked very much as though appellant saw the boy and tried to avoid him, but was unsuccessful owing to the great speed at which the car was travelling.

Appeal dismissed.

Solicitor for Appellant—*W. H. Cahill.*

ELIJAH FRANCIS.

Elijah Francis.

Severity of sentence—The Court will take into consideration the fact that appellant did not put his good character in issue at the trial.

This was an appeal against sentence, leave having been granted by Mr. Justice Darling.

Appellant was convicted of burglary, at Middlesex Sessions, before the Deputy-Chairman, on November 28th, and sentenced to nine months' hard labour.

Appellant, who appeared in person, said that he had never been convicted before, and had been led away by bad companions.

L. S. Green for the Crown. Appellant did not make use of his opportunities at the trial to put his good character forward. His

1908
18 *December.*
Elijah Francis.

last employer was now present and was willing to take him back directly the Court allowed.

The employer expressed his willingness to take this course.

The Lord Chief Justice: In the circumstances the Court will only require appellant to be bound over to come up for judgment when called on.

Sentence reduced.

Maud Kersey.

MAUD KERSEY.

A jury is entitled to accept the confession of a defendant, without other evidence.

This was an appeal, on a point of law, against a conviction of concealment of birth.

Appellant was indicted for murder, at the Guildford Assizes, before Mr. Justice Ridley, on December 1st, 1908, found guilty of concealment of birth, and sentenced to eight months' imprisonment with hard labour.

Bridgewater for appellant, who was not present. Appellant was convicted practically on her own confession, and mere confession was not sufficient evidence to convict upon. Also, under sect. 60 of the Offences against the Person Act, 1861 (24 & 25 Vict. c. 100), in order to convict of concealment of birth, there must be a secret disposition of a dead body. There was no evidence to shew that the child was dead when disposition was made of its body.

Darling J.: The mother's own statement was: "The child was born on the 21st October. I put a cloth over its mouth, and cremated its body in the kitchen grate the next day." It could not be said that there was a disposition of a live body, which afterwards died.

The Lord Chief Justice: There is nothing in the first point with regard to confession. There is abundant authority that a clear and unequivocal confession may be sufficient in law.

1908
18 *December.*
Maud Kersey.

Counsel, in support of his second point, referred to *Jane May* (1867, 10 Cox, C. C. 448; 16 L. T. 362; 15 W. R. 757, C. C. R.).

Beaumont Morice, for the Crown, was not called on.

The Lord Chief Justice: The evidence was that the girl had suffocated the child. The body was burned the day after. There was a dead body, of which there was concealment. With regard to the confession, confessions depend upon the circumstances under which they are made; and in this case the confession was one upon which the jury were entitled to act.

Appeal dismissed.

Solicitor for Appellant: *C. G. Cudby, Croydon.*

BEFORE

MR. JUSTICE DARLING, MR. JUSTICE WALTON AND MR. JUSTICE PICKFORD.

1908
22 *December*.

James Macdonald (otherwise Murphy).

JAMES MACDONALD (OTHERWISE MURPHY).

This Court can only take cognisance of legal insanity as a defence. In this respect it has not the powers of the Home Secretary.

This was an application, referred to the full Court, for leave to appeal against a conviction before Mr. Justice Pickford, at the Central Criminal Court, for murder.

The trial was on December 14th and 15th. Appellant was sentenced to death.

The facts in this case were practically undisputed.

At about 11.20 a.m. on Saturday, November 7th, 1908, the appellant went into the office of one Julius Schlitte, a banker, &c., carrying on business at 84, Shaftesbury Avenue. He immediately fired a revolver at Mr. Schlitte over the counter; then went behind the counter and attacked Mr. Schlitte with a knife having a spring blade. The latter gave the alarm by throwing some brass weights through the window, and one of the witnesses for the prosecution went into the office and saw a struggle taking place. On seeing that a knife was being used he ran out of the office to find the police. Appellant immediately ran out of the office, and on a carman trying to arrest him stabbed him severely in the hand, and also stabbed a policeman who seized him in the shoulder, dropping his knife and being almost immediately tripped up and arrested.

The injured men were taken to hospital, and on the afternoon of Sunday, November 8th, Schlitte's depositions were taken; in this deposition Schlitte stated that appellant came into his office, and without saying a word fired at him—he had never to his knowledge seen appellant before, and had had no business transactions with him. Schlitte died early on the following morning.

1908
22 *December*.
James Macdonald (otherwise Murphy).

It was proved that on his arrest he was "quite calm." The revolver, a 4 in. Webley-Fosbury ·455, had been bought the day before the crime, together with a quantity of ammunition and a gun licence (for which latter appellant gave his correct name and address), from a rifle and revolver range, where he had been known for the last two or three months. The theory of the prosecution was that appellant having been out of work since March, and having been living on his sister, had determined to rob this bank. The defence raised was that the prisoner was insane at the time he committed the crime, the insanity being temporary and caused by an attack of *petit mal*, one of the forms of epilepsy. His sister's deposition (she having just undergone an operation) was put in to prove that his father had suffered from fits, that his mother suffered from fits and used to "froth at the mouth," that on the death of her husband his mother was locked up for eighteen days as being insane, and that the deponent had always been in fear of her brother, though she never let him know it, because he seemed so queer. Appellant had suffered from typhoid and malaria, and had twice had sunstroke. He had been born and bred in India

Evidence was also given as to his having recently been subject to violent fits of rage against his sister, in which he had attempted to kill her.

Buddle Atkinson for the appellant (under sect. 10 of the Criminal Appeal Act), who was not present. No question arose on the facts, but the circumstances in which appellant did the act were so atrocious, the possibility of escape, even had a robbery been successfully carried out, so remote, that, having regard to the evidence for the defence, it almost inevitably led to the conclusion that he was insane at the time he committed it. Appellant was suffering from *petit mal*, a disease which at times manifested itself by violent outbursts of rage, in which the patient might perpetrate the most awful crimes, and shortly after have no recollection—or a very hazy recollection—of the occurrence. Appellant, who was born and bred in India, was only twenty-two years of age; his father had suffered from fits, his mother and sister were epileptics. After drawing attention to his continuous good character and his responsible appointments up to March of this year, counsel submitted that from that time onwards applicant's mind had been steadily deteriorating. Henry Bouger, a witness who had known him for some eighteen months, had testified that he was absent-minded at times and very strange in his looks.

1908
22 *December.*
James Macdonald (otherwise Murphy).

The medical evidence shewed that there might be some giddiness before an attack of *petit mal*, and that anyone suffering from this disease would be subject to absent-mindedness.

In answer to the Court counsel said he could not attempt to argue that the case had not been properly left to the jury, neither could he contend that the verdict was unreasonable; he did, however, submit that on the evidence there was a grave doubt as to the sanity of appellant.

[DARLING J. said that if counsel could neither contend that the case had not been properly left to the jury, nor that the verdict was unreasonable, it was most unlikely that the Court would interfere.]

If this application was granted, he had a further one to make—namely, to call further evidence on behalf of appellant. The first witness he would wish to call was one who would prove that he had seen him some twenty minutes before the crime, and that he then appeared to be somewhat dazed.

[DARLING J.: One would not expect a person to be other than strange in manner if he had determined to commit a murder.]

Nor would you expect him to be "perfectly calm"—"as calm as ordinary people walking along the street"—three minutes after the crime, as sworn to and insisted upon by the police in this case.

[It appeared that this proposed witness had been examined before the coroner, though not before the magistrate, or at the trial.]

The second proposed witness was appellant's former landlady, who could speak to his previous epileptic fits. Her husband had written a letter to counsel during the trial.

The Court ordered that this letter be sent for. When produced, it appeared that the material parts were as follows:—" . . . . Appellant suffered from delusions and severe head troubles, and also ague and depression, his mania being a sincere belief in horoscopes and mesmerism. He told us many curious tales of his life in India, saying he could make his black servants stand still for twenty-four hours, and could will them to do anything he wanted by concentrating his mind on it. He also said that he

could will me home from business. We came to the conclusion that he was, to a certain extent, harmlessly insane. My wife has in her possession a paperweight, replica of a revolver, which she took from him because he frightened her with it. He us-d at that time to attend King's revolver range for practice. . . . . Furthermore, he always said he had only a short time to live, and did not want to live long. . . . . He called on us about a week after he left, and although he was perfectly sober at the time, he had one drink with me, and afterwards became perfectly irrational."

The third proposed witness was a retired Indian Civil Servant who had known him for twelve years, and had been his constant companion in India. Writing from Jersey, this gentleman stated that since coming to England appellant had several times suffered from fever and that this "*invariably affected his mind.*"

[PICKFORD J.: There appears to be no evidence that appellant had ever previously suffered from epilepsy.]

It is submitted that the violent attacks made by him on his sister, and his irrational conduct at times, was evidence which required careful consideration.

[DARLING J.: When do you suggest that he was attacked by this fit of *petit mal*?]

He entered the office in Shaftesbury Avenue in order to make enquiries as to the best means of remitting money to or from Panama, and being suddenly attacked by this disease he committed the act. Certain passages in the evidence proved that he really did intend to go to South America. It was also desired to call his sister, whose depositions had been read at the trial.

[PICKFORD J.: I do not think that could help him much—the depositions were read to the jury, and there was much in them which, had the witness been present, I should not have allowed to be put.]

DARLING J.: No suggestion has been made that the case was not properly left to the jury; no suggestion has been made that any matter favourable to the defence has been overlooked; but it was suggested that the possible evidence of the new witnesses

1908
22 *December*
James Macdonald (otherwise Murphy).

whom it was proposed to call would suffice to upset the verdict. As to that, I can only say that, having regard to the onus on the defence when the only defence raised was that of insanity, and to the legal definition of insanity, even assuming that the proposed evidence had been before the jury, and had been accepted by them as it had been read by the Court, they might still have returned a verdict of "Guilty" without being unreasonable. There is, further, no ground for saying that there has been any miscarriage of justice.

The Court wishes, however, to say that the passing of the Act under which this application was made in no way interferes with the prerogative of mercy exercised by his Majesty; it in no way alters, qualifies, or diminishes the powers or duties of the Secretary of State in advising his Majesty as to the exercise of that prerogative; and though this application must be refused, because the evidence brought before the Court will not justify them in granting the leave asked for, still, matters have been laid before them which, in their opinion, might properly be brought to the notice of the Home Secretary.

Application refused.

INDEX.

ABOMINABLE CRIME,
corroboration in, 30, 39.

ABORTION,
accessory to, 101.

ACCELERATION OF DEATH, 15.

ACCIDENTAL ADMISSION OF EVIDENCE. *See* EVIDENCE.

ACCOMPLICE. *See* CO-PRISONER.
corroboration of, 30, 64, 215, 227.
in abominable crime, 39.

ACQUIESCENCE
in receipt of stolen property, 199.

AFFIDAVIT
as to further evidence, 46, 69, 166.

AGE IN RAPE. *See* RAPE.

AGENCY
in criminal law, 135, 218.

ALIBI
as a defence, 6, 25, 35, 57, 70, 130, 132, 238.
prisoner not giving evidence as to, 133.
should be disclosed at the earliest opportunity, 130, 240.

ALMS,
collecting, by false pretences, 176.

AMENDMENT
of notice of appeal, 19.

ANIMUS FURANDI, 20, 188.

ANSWERS OF WITNESSES. *See* QUESTION; WITNESS.
objections to, 119.

APPELLANT. *See* PRISONER.
called on appeal, 239.
not called at trial, 62, 133.

ASSAULT,
conviction for, a bar, 14.

"ASSISTING IN CONDUCTING THE BUSINESS," 146, 161.

ATTEMPT
to commit larceny, 32.
suicide, as a ground of leniency, 10.

BAIL,
granted by Court of Appeal, 104, 154.

BELIEF,
honest, not incompatible with criminal negligence, 242.

BETTING CLUB, 146, 161.

BIGAMY, 86.

BONÂ FIDE CLAIM OF RIGHT, 174.

BORSTAL SYSTEM,
sentence increased in view of, 170.

BREACH OF TRUST
criminal within Larceny Act, 77.

"CALCULATED TO MISLEAD," 54.

CASE AT TRIAL,
close of, of prosecution, 79, 168.
on what lines conducted, Court must consider, 68, 76.

CAUTION TO JURY, 143, 227, 235, 251. *See* ACCOMPLICE.

CERTIFICATE
of judge, &c., appeal on, 5, 6, 169, 186.

CHARACTER,
evidence of, before verdict, 116, 119.
good, in relation to sentence, 30, 35, 43, 120, 259.

CHARGE,
non-denial of, effect of, 39.

CIRCUMSTANTIAL EVIDENCE, 112, 258.

CLAIM OF RIGHT,
bonâ fide, 174.

CLOSE OF CASE FOR PROSECUTION. *See* CASE AT TRIAL.

CLUB
for betting, 146, 161.

COIN,
uttering one, 6.

COMMENT
on defendant not giving evidence, 218.

COMMITTEE OF COUNTY ASYLUM
not a corporate body, 179.

"COMPROMISE" VERDICT, 165.

CONCURRENT SENTENCES
of penal servitude and hard labour, 209.

CONDUCT OF CASE. *See* CASE AT TRIAL.

"CONDUCTING THE BUSINESS," 163. *See* ASSISTING.

CONFESSION
may be sufficient to convict, 260.

CONVICTION
quashed, 6, 8, 15, 42, 51, 79, 80, 100, 143, 145, 158, 175, 188, 190, 202, 229, 238, 241.

CO-PRISONER. *See* PREVIOUS CONVICTION *and* STATEMENT.

CORONER'S JURY,
verdict of, relation to trial, of, 219.

CORPORAL PUNISHMENT, 82, 93, 215.

CORROBORATION, 30, 39, 64, 121.

COUNSEL,
duty of, in addressing Court, 75.
how many heard, 12.
mistake of, 154. *Cf.* 183.
must object at the moment, 119.
question omitted by, 20, 49.
refusing to call witnesses at trial, 183.
responsibility of, in calling fresh witnesses, 46, 50.

COUNTS,
separate, in indictment under Inebriates Act, 206.

COUNTY PROPERTY,
how laid in indictment, 177.

COURT,
mistake of, as to undefended prisoner, 183.

CREDIBILITY
of material witness, fresh evidence as to, 212.

CUMULATIVE SENTENCE, 42.

CUSTODY
before trial taken into account in sentence, 165.

DEATH SENTENCE,
commuted; 110, 220.

DEFENCE,
judge is not bound to discuss, 167. *See* MANSLAUGHTER.
making imputations on prosecutor, 234.
not disclosed before the magistrate, 130.

DEFENDANT. *See* PRISONER.

DELIVERY OF PROPERTY
by mistake, 20.

DEPOSIT
obtained by false pretence, 253.

DEPOSITIONS,
Court may look at, 49.
when, may be read in evidence, 57.

DETENTION OF INEBRIATES. *See* INEBRIATES.

DIRECTION
in murder as to manslaughter, 233.

DISAGREEMENT OF JURY. *See* JURY.

DOCUMENTS, &c.,
ordered to be in Court, 33.

DRUNKENNESS AND CRIME. *See under* SENTENCE.

DUTY
to seek owner of lost property, 20, 35.

EVIDENCE
of prisoner, in *alibi*, necessary, 132.
similar crime, 160, 246.
not given at the trial, Court may receive, 168. *Cf.* 244.
prejudicial, jury must be cautioned against, 227, 234, 251.
properly left to the jury, 3.
improperly left to the jury, 157. *See* PREVIOUS CONVICTION.
slight mistake in receiving, 82, 128, 234.
rejecting, 256.
in, 153.
to go to the jury, whether any, a point of law, 77.
verdict against weight of. *See* VERDICT.

EXTENSION OF TIME
for appeal, 216.

FACT,
important, unknown to the judge, 50.

FACTS
of a case, judge's opinion on, 52.
tested, 12, 36.

FALSE PRETENCES
or larceny? 4, 10.
guilty knowledge in, 240.
in collecting alms, 176.
through contract, 253.

"FALSE TRADE DESCRIPTION," 54.

FELONY,
joinder of more than one, in indictment, 15.

FINDING OF JURY,
not necessarily a verdict, 35.

FIRST CONVICTION,
severity of sentence for, 37, 131.

FITNESS TO PLEAD,
verdict of, 95.

FIXTURES,
larceny of, 88.

FOUND PROPERTY, 20, 35.

FRESH *or* FURTHER EVIDENCE
called, 8, 47, 50, 52, 69, 70, 105, 144, 166, 185, 191, 204, 205, 225, 236, 238.
not allowed, 17, 25, 26, 27, 30, 33, 34, 63, 95, 129, 153, 212.
as to character of a material witness, 212.
conditions of allowing, 95, 165, 204, 251.
duty of counsel as to, 27, 46, 50.
nature of, must be disclosed, 95, 165, 204.
on immaterial points, 153, 212.
only as to character, 26.
raising grave doubt, 144.

FRIVOLOUS APPEALS, 109.

FULL OFFENCE (LARCENY)
or attempt? 18, 31.

FURIOUS DRIVING. *See* NEGLIGENCE.
what is evidence of, 258.

GOOD CHARACTER. *See* CHARACTER *and* SENTENCE.

GUILTY,
but insane, verdict of, 219.
found by C. A., 97.
general verdict of, under sect. 92 of Larceny Act, 79.
plea of, only a bar to appeal against conviction, 26, 61, 180.

GUILTY KNOWLEDGE
in false pretences, 240.
of premises being used for betting, 146, 161.
of receiver, 124. *See* RECEIVING.

HABITUAL DRUNKARD,
sentence on, 83, 192, 206, 252.

HANDWRITING,
evidence of, 34, 57.

HARD LABOUR,
remitted, 209.

HARD LABOUR AND PENAL SERVITUDE,
concurrent sentences of, 209.

HARD LABOUR OR PENAL SERVITUDE? 84, 196.

HOME SECRETARY,
circular from, 173, 196.
powers of, 8, 70, 82, 88, 110, 172, 234, 245, 262.

HOSTILE WITNESS, 155.

HUSBAND AND WIFE,
in receiving, 199.

IDENTIFICATION, 57, 84, 203.
of property, 80, 197.

IDENTITY, MISTAKEN. *See* MISTAKEN IDENTITY.

IMPORTANT FACT
not known to the judge, 50.

IMPRISONMENT .
or penal servitude? 84.

INCITEMENT TO CRIME,
evidence of similar crime, 158.

INCONSISTENT DEFENCES, 231.

INCONSISTENT VERDICT
cannot stand, 190.

"INCORRIGIBLE ROGUE,"
appeal of, 82, 85.

"INDECENCY,"
a question for jury, 135.

"INDICATE THE PARTICULAR CLASS OF GOODS," 54.

INDICTMENT
under particular sections. *See these sections in Table of Statutes.*
Inebriates Act, 206, 207.
at common law, for receiving, verdict in, 88.
charging more than one felony, 16.
county property, how laid in, 177.
effect of, on sentence, 47. *See* OTHER OFFENCES.
not in Court, 14.
part of allegations in, proved, 49.
power of Court, as to, 8, 100.
untried, order as to, where conviction is quashed, 100.

INEBRIATE,
detention of, 192, 206, 252.

INQUISITION,
coroner's, and trial, 219.

INSANE APPELLANT,
application in writing by, 28.

INSANITY,
defence of, 95, 219, 262.
evidence of, 70.
found by the Court of Appeal, 97.
not set up at the trial, 45.

"INTENT TO DEFRAUD," 73, 189, 249.

INTENTION
to restore property lost, &c., 24.

INVALID
"first" marriage, 86.

JOINDER. *See* FELONY.

JUDGE
mis-stating effect of evidence, 52.
opinion of, on the facts, 52.
guilt of prisoner, 194.
report of, 87, 121, 124, 182.
single, also judge at trial, 210.
unaware of relevant facts, 50.
urging jury to agree, 17.

JURY. *See* CORONER'S JURY; VERDICT.
agreement of, after disagreement, 17.
caution to. *See* CAUTION; PREJUDICIAL EVIDENCE; and PREVIOUS CONVICTION.
statement of, not a verdict, 36.

LARCENY
or false pretences? 4, 10.
by a bailee, 11.
by a trick, 11.
by owner of the goods, 186.
of goods *in custodia legis*, 186.
found, 24.
when complete, 31.

LAW, POINT OF. *See* POINT OF LAW.
legal aid granted on, 132.
misdirection on, 177.

LEGAL AID
generally, 130.
granted by Court, 18, 26, 27, 130, 132.
in appeal against sentence, 4, 131.

LESSER OFFENCE,
verdict of, judge's duty as to, 26.

LOST PROPERTY. *See* DELIVERY OF PROPERTY BY MISTAKE.

"MALICIOUSLY," 174.

MANSLAUGHTER. *See* YEAR AND DAY.
by negligence, 242.
direction as to, in murder, 233.
murder not necessarily reduced to, by "provocation," 233.

MASTER AND SERVANT,
in criminal law, 80, 138, 218.

MATERIAL WITNESS,
absence of, 154.
not called, 81.
previous conviction of, 212.

MAXIMUM SENTENCE, 106.

MENTAL DEFICIENCY. *See* INSANITY.

MERCY,
Court will not entertain appeal for, from third parties, 12.
recommendation to, 234, 245.

"MISCARRIAGE OF JUSTICE," 6, 12, 247. *See* the references to sect. 4 (1) of the Criminal Appeal Act in *Table of Statutes*.

MISDIRECTION, 4, 10, 13, 20, 24, 26, 48, 51, 52, 54, 65, 75, 177, 256. *See* DIRECTION *and* SUMMING-UP.
a point of law, 11, 15.
not suggested, 245, 264.
on immaterial point of law, 177.
slight, 52, 256.

MISREPRESENTATION
in contract, 253.

MISTAKE
in evidence. *See* EVIDENCE.
in summing-up, 144. *See* SUMMING-UP.
of counsel or solicitor. *See* COUNSEL.

MISTAKEN IDENTITY, 34, 144, 236.

MOTIVE,
absence of, 181.

MURDER,
appeals in cases of, 65, 95, 110, 167, 181, 219, 233, 245, 262.
direction in, as to manslaughter, 233.
provocation in, in relation to manslaughter, 233.

NEGLIGENCE
manslaughter by, 242, 258.

NERVOUSNESS,
an "illness," 57.

NEW TRIAL,
in a civil case, 186.
value of, 15, 143, 213.

NO CASE,
at close of prosecution, 79, 168.

NON-DENIAL
of charge, 41.

NOTICE OF APPEAL,
amendment of, 19.
dispensed with, 26.

NUMBER OF WITNESSES
for and against *alibi*, 25.

OBJECTIONS,
what, must be taken at the moment, 85, 113.

OMISSION
in summing-up not necessarily misdirection, 113.

ONE SENTENCE
for all pending charges, where possible, 42, 172, 196. *See* OTHER OFFENCES.

ONUS
when on appellant, 3.
prosecution, 6, 94, 111, 247.

ORDER
as to untried indictment, 100.
of restitution. *See* RESTITUTION ORDER.

"OTHER FRAUD," 189.

OTHER OFFENCES
affecting sentence, 13, 43, 47, 64. *See* ONE SENTENCE.
disclosed in evidence, 158, 246.

OWNER OF GOODS
cannot steal them (except from bailee), 186.

PENAL SERVITUDE
or imprisonment ? 83.
concurrent with hard labour, 209.
not to be tacked on to hard labour, 196.

PENDING CHARGES,
where possible, to be considered by the Court of trial, 172, 196.

PERJURY
of prisoner as a ground for increasing sentence, 65.
witness at trial, alleged, 30.

PERMISSION
to use premises for betting, 146, 161.

"PERSONS USING" premises for betting, 146, 161.

PLAN
not produced at trial, 145.

PLEAD,
fitness to, no appeal from finding of, 95.

POINT OF LAW,
emerging on an application, 192, 216.
misdirection on, 177. *See* CONVICTION QUASHED.
not taken at the trial, 11, 85.

POLICE EVIDENCE
after verdict, 43.

POLICE SUPERVISION, 38, 176.

POSSESSION
of servant, possession of master? 80. *See* AGENCY.

POST OFFICE
employes, sentences on, 30.
(Protection) Act, 1884, effect of, 140.

PREJUDICIAL EVIDENCE. *See* EVIDENCE; PREVIOUS CONVICTION.

PRESENCE
of appellant, 13, 19, 212.

PREVIOUS CONVICTION,
accidentally deposed to, 21, 27.
confession of, by defendant, 5, 47, 82, 142.
co-defendant, 37, 227.
proof of, under Prevention of Crimes Act, 134.
may be admissible, 135.
reference to, 29, 133.
under Prevention of Cruelty to Children Act, 13.

PREVIOUS PROSECUTION
disclosed, 128, 248.
proved by defence, 135.

PREVIOUS STATEMENT
put to witness not evidence against prisoner, 155.

PRINCIPAL
in receiving. *See* RECEIVER.

PRISONER,
in second division, 244.
making case against himself. *See* WITHDRAWING CASE FROM JURY.
not giving evidence, effect of, 62, 64, 218.
in *alibi*, 132.
when no *primâ facie* case, 149, 150, 151.
comment on, 218.
to be present, right of, 212.
undefended, supposed by Court to be defended, 183.

PRISONER'S STATEMENT
not evidence against co-prisoner, 78.

"PROCEEDINGS AT THE TRIAL," 174.

PROSECUTOR,
imputations on, in defence, 234.

PROVOCATION,
finding of, effect of, 233.
weapon used under, 225.

QUESTION,
improper, 246.
answer to, 119.
not objected to, at the moment, 119.
omitted by counsel, 20, 49.
put at trial, ground for leave to appeal, 133.

RAPE,
corroboration in, 121.
double defence in, 229.

RECEIVER,
guilty knowledge of, a question for the Court, 124.
though not principal, convicted, 88.

RECEIVING,
acquiescence in, 199.
adoption of, 199.
evidence of theft in, 36, 77.
in indictment. *See* STEALING.

RECENT POSSESSION, 124.

RECIDIVISM, 180. *See under* SENTENCE.

RECOMMENDATION TO MERCY. *See* MERCY.

REPORT
as to convicted prisoner's antecedents may be in writing, 193.

RES GESTÆ, 160.

"RESORTING THERETO," 149.

RESPONDEAT SUPERIOR. *See* MASTER AND SERVANT.

RESTITUTION ORDER, 16.
revoked, 143, 145.

RE-TRIAL,
appeal, not, 48, 52, 75, 112, 182.

REVISION OF SENTENCE,
principles of, 29, 62, 107, 177, 180.

RIDER
to verdict of coroner's jury, 219.
petty. *See* PROVOCATION.

RIGHT,
bonâ fide claim of, 174.

"RINGING THE CHANGES,"
attempted, 31.

SECOND DIVISION PRISONER, 244.

SELF-DEFENCE,
weapon used in, 225.

SENTENCE. *See* CORPORAL PUNISHMENT.
appeals, &c. against, 4, 6, 9, 10, 12, 17, 18, 20, 26, 27, 28, 30, 32, 37, 38, 42, 47, 53, 64, 83, 85, 87, 93, 95, 106, 109, 110, 111, 131, 146, 165, 170, 172, 176, 180, 194, 196, 226, 229, 234, 252, 255, 259.
altered, 97.
appeal against, withdrawn by leave, 10.
"fixed by law," no appeal against, 110.
generally runs from date of appeal, 177.
in view of particular treatment, 170.
increased, 24.
judge's report on, 87, 121.
legal aid to appeal against, 4, 131.
influenced by prisoner's antecedents, 13, 28, 43, 93, 146, 180, 229.
imputations on prosecutor, 234.
interval between convictions, 180.
another indictment not proceeded with, 47.
other suspected crimes, 65, 172.
perjury, 65.
custody before trial, 165.
previous good character, 43, 259.
exceptions to, 30, 36, 120.
length of, 83, 84, 170, 195.
maximum, 106, 141.
on habitual drunkard, 83, 195, 206, 252.
on separate counts, whether good, 206.
reduced, 42, 170, 174, 180, 197, 209, 252, 255, 259.
only when prosecution represented, 165.
relative severity of, 77, 111, 120.
review of, when prisoner pleads guilty, 62, 180.
revision of, principles of, 29, 107, 180.
where offence committed in drink, 107, 141, 255.
where possible, should include all offences, 42, 172, 196.
wrong in law, 87.

SERVANT AND MASTER. *See* MASTER AND SERVANT.

SEVERITY OF SENTENCE,
not dependent on value of property stolen, 176.
on first conviction, 37, 131.
plea of guilty, 180.
relative, 77, 111, 120.

SHORTHAND NOTE,
omissions from, 82, 174, 175.

SIMILAR CRIME
to that charged in evidence, 158, 246.

SINGLE JUDGE,
powers of, 5.
who has been judge at the trial, 211.

SLIGHT
misdirection. *See* MISDIRECTION.
mistake as to evidence. *See* EVIDENCE.

SOLICITOR,
assigned, 45, 47. *See* LEGAL AID.
mistake of, 154.

SPECIAL TREATMENT
in prison, 244.

SPECIAL VERDICT
substituted, 97.

STATEMENT
of prisoner not evidence against co-prisoner, 77.
of witness, previous, put in, 155.
put to a witness may not be evidence against prisoner, 155.

STEALING AND RECEIVING
in indictment, 79, 88.

SUBPŒNA
on appeal, 46.

SUFFICIENT LOCALISATION,
what is, 146.

SUMMARY LIST, 45.

SUMMARY OFFENCE
also indictable, 193.

SUMMING-UP. *See* MISDIRECTION, *and under* JUDGE.
mistakes in, 54, 84, 98, 132, 144, 177.
need not discuss the defence, 168.
omissions in, 117, 168, 182.
particular expressions in, 68, 76, 195.
should put the case for defendant, 228. *Cf.* 168.

SURRENDER
as a ground of mitigation, 53.

SUSPICION
of other crimes, a ground for increasing sentence, 65, 172.

TEMPORARY INSANITY
as a defence, 219.

TEST
of innocence or guilt. *See* FACTS OF A CASE TESTED.

THEFT. *See* LARCENY.
evidence of, in receiving, 36, 77.

TRUST. *See* BREACH OF.

UNDEFENDED PRISONER
supposed to be defended, 183.

UNEXPIRED SENTENCE,
serving, 87.

UNNATURAL OFFENCE,
corroboration in. *See* CORROBORATION.

"UNPREMEDITATED"
in a verdict, 234.

UNTRIED INDICTMENT,
when conviction is quashed, 100.

USER
of premises for betting, 146, 161.

UTTERING
one coin, 6.

VERDICT. *See* JURY.
against weight of evidence, 3, 4, 5, 6, 18, 48, 52, 245.
general, 78, 79.
inconsistent, 190.
of fitness to plead, no appeal from, 97.
principles of Court as to reviewing, 3, 15, 19, 25, 35, 245.
special, substituted by Court of Appeal, 97.
varied, 91, 170.

WEAPON
used in self-defence, 225.

WEIGHT OF EVIDENCE, VERDICT AGAINST. *See* VERDICT.

WHIPPING,
appeal against sentence of, 82, 93.

WITHDRAWING CASE FROM JURY, 158, 168.

WITNESS. *See* COUNSEL.
appellant a, 239.
hostile, 155.
material, not called, 80, 111.
previous conviction of, 212.
absence of, 154.
particular answers of, 77.
prisoner not a, 62.
to be called on appeal, 46, 50.
name, &c. of, must be disclosed, 95, 165, 204.
who might have been called at the trial, 22, 27, 33, 63, 111, 129, 183, 250, 251.

WITNESSES,
relative numbers of, on either side, 25.

WRITING,
appeal in, only, 6, 255.
application in, only, 10, 28.

YEAR AND DAY,
in manslaughter, 13.

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